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No. _____

In The

Supreme Court of the United States

October Term, 1999

WENDY J. EIMERS,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution to present a defense of her choosing and witnesses in her favor violated by the trial court's preclusion of the testimony of a character witness on the prosecutor's objection that the witness' physical disabilities might create sympathy among the jurors which would prejudice the People's case?

2. Was the character witness' right to equal protection of the law violated when she was denied the right to participate in the criminal justice process simply because a prosecutor feared that her disabilities would create sympathy among the jurors which might prejudice the People's case?

PARENT AND SUBSIDIARY COMPANIES

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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OPINIONS AND ORDERS BELOW

On May 20, 1997 the Chautauqua County (N.Y.) Justice Court, Town of Pomfret, issued a Certificate of Conviction convicting Wendy J. Eimers of the offense of overdriving and injuring animals, and failure to provide proper sustenance in violation of New York's Agriculture and Market Law Section 353. The certificate is reproduced in the Appendix at page A-7. During the trial of this matter, petitioner was barred from presenting the testimony of a character witness on the prosecutor's objection that the witness' physical disabilities might create sympathy among the jurors. The relevant portions of the trial transcript are set forth in the Appendix at pages A-1 through A-2.

After receiving the briefs of the parties (set forth in the Appendix at pages A-8 through A-84) and hearing oral argument, the County Court for the County of Chautauqua, New York, rejected petitioner's arguments that, *inter alia*, her Sixth and Fourteenth Amendment rights to present a defense of her choosing and to present witnesses on her behalf were violated by the trial court's preclusion of the character witness. The Chautauqua County Court also rejected petitioner's argument that the character witness' right to equal protection of the law pursuant to the Fourteenth Amendment was violated when she was precluded from testifying because of her physical disabilities. The order of the County Court is set forth at pages A-3 through A-5 of the Appendix.

On October 1, 1999, the State of New York Court of Appeals issued a certificate denying leave to appeal, holding that there is no question of law presented which ought to be reviewed by the Court of Appeals. The certificate is reproduced in the Appendix at page A-6.

JURISDICTION OF THIS COURT

The order of the New York State Court of Appeals denying petitioner's application for leave to appeal to that Court was filed on October 1, 1999 (A-6). Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 13 of the Rules of this Court, as a final judgment subject to discretionary review reviewed by the highest court of New York in which review could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Article I, Section 6

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury,

shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

New York State Constitution, Article 1, Section 11

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

New York State Agriculture and Markets Law, Section 353 *(in relevant part)*

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animals of necessary

> sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

New York Agriculture and Markets Law, Section 356 *(in relevant part)*

> A person who, having impounded or confined any animal, refuses or neglects to supply to such animal during its confinement a sufficient supply of good and wholesome air, food, shelter and water, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

New York State Civil Rights Law, Section 40-C(2)

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the Penal Law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

New York State Criminal Procedure Law, Section 60.20

> 1. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence.
>
> 2. Every witness more than twelve years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath. If the court is not so satisfied, such child or such witness over twelve years old who cannot, as a result of mental disease or defect, understand the nature of an oath may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.
>
> 3. A defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to subdivision two.

STATEMENT OF THE CASE

This case involves the preclusion of a character witness from testifying at trial due simply to the fact that she is confined to a wheelchair. In doing so, the court denied Wendy J. Eimers, the petitioner, her Sixth Amendment right to present a defense of her choosing and her Fourteenth Amendment right to due process of law. Additionally, in preventing Janet Pulci from exercising her choice to participate in the judicial process as a character witness

because of her disability, the court violated her Fourteenth Amendment right to equal protection.

Mrs. Eimers, a fifty-one year old Jamestown, New York resident and a registered nurse of thirty-one years at the time of trial, is married and has eight children varying from eleven to twenty nine years of age (R-324).[1] Mrs. Eimers began working as a registered nurse after she graduated from Jamestown Community College in 1966. She stopped working in that capacity for about ten years so she would be able to raise her children with her undivided attention. Soon thereafter, her husband became disabled and Mrs. Eimers became the primary breadwinner for her family (R-325).

Because of Mrs. Eimers' love for animals and her desire to care for sick, stray animals, she and her husband constructed a kennel in their backyard. From her home Mrs. Eimers was able to both house dogs that no one else wanted and raise dogs for sale (R-310, 348).

Ms. Holly Loffland, an inspector with the American Kennel Club phoned Mrs. Eimers at her home on July 22, 1996 to inform her that she would be coming to her house the next day to review her records (R-119). Although Mrs. Eimers was unaware that Ms. Loffland was going to do a walk-through of the kennels, she was more than accommodating when Ms. Loffland made her request (R-329).

Ms. Loffland stated that some of the runs in which the dogs were kept had earth floors (R-217). She also stated that some dogs had matted coats (R-218). However, she never testified that these

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[1] Parenthetical references preceded by the letter "R" refer to citations to the Record on Appeal in the state courts.

dogs were injured or lacked proper food or water. In addition, Mrs. Eimers was in full compliance with the AKC record keeping and lineage records.

During their tour of the yard, Mrs. Eimers pointed out to Ms. Loffland some of her concerns with regard to the dogs and she also sought advice (R-331). Specifically, she pointed out that some of the cocker spaniels she had recently purchased were matted because their previous owned never paid proper attention to them (R-331). Mrs. Eimers attempted to remove the matts from the dogs, but they were difficult for her to keep under control (R-332).

Mrs. Eimers also sought Ms. Loffland's expertise with regard to a golden retriever which had a sore on its nose. Ms. Loffland informed Mrs. Eimers that a salve-like substance called Squat could be therapeutic for the golden retriever's nose (R-342). Mrs. Eimers subsequently applied the Squat to the dog's nose to aid in the healing process (R-268). Ms. Loffland never stated that the golden retriever had been abused or lacked food or water.

Another area of the kennel Ms. Loffland inspected was the whelping room, though she remained six feet outside the building during the inspection (R-344). While Ms. Loffland stated that she personally disliked the construction of the cages and the way they were set up, she never stated that any of the dogs in the whelping room were abused or appeared injured.

Ms. Loffland never issued Mrs. Eimers a warning letter indicating that her premises were in violation of any AKC regulations (R-251). In fact, the first report made by Ms. Loffland to a law enforcement agency with regard to the condition of the Eimers' kennel was on September 13, 1996 when she advised that the dogs were being deprived of wholesome air, shelter and water

and essential care needed for basic medical treatment (R-255, 23). Obviously, Ms. Loffland did not feel a sense of urgency in reporting the condition of the kennel because she waited nearly fifty-two days before contacting law enforcement.

Petitioner was arrested and charged with the offense of overdriving, torturing, injuring animals and failing to provide proper sustenance in violation of Section 353 of the New York State Agriculture and Market Laws in the County of Chautauqua on the 23rd of July, 1996 (R-8). She was also charged with the offense of failing to provide proper food and drink to impounded animals in violation of Section 356 of the New York State Agriculture and Markets Law in the County of Chautauqua on the 23rd of July, 1996. At petitioner's arraignment in the Town of Pomfret Justice Court on September 17, 1996, she entered a plea of not guilty (R-8).

At a jury trial held in the Town of Pomfret Justice Court on Monday, May 19, 1997, several witnesses, including petitioner, testified concerning Mrs. Eimers' care of the dogs at her kennel. In addition to petitioner's testimony, defense counsel sought to present the testimony of a character witness, Janet Pulci. The prosecutor objected to Mrs. Eimers' presentation of Ms. Janet Pulci as a character witness on the ground that the jury might be sympathetic to her because of a crippling condition which had confined her to a wheelchair (R-385). Defense counsel, however, emphasized to the Court and the Assistant District Attorney that he intended to call Ms. Pulci as a character witness and that he did not intend to interject anything about her physical condition. In particular, defense counsel explained that Ms. Pulci would have testified as to petitioner's reputation in the community for veracity, truthfulness, kindness and sympathy to the injured and ill-traits obviously relevant to the animal abuse charges lodged against the petitioner (A-1; R-385).

The trial court judge, Honorable David A. Prince, did not allow the witness to testify (A-2; R-386). Subsequently, the jury found Mrs. Eimers guilty of a violation of Section 353 of the Agricultural and Market Laws which prohibits overdriving, injuring or failure to provide proper sustenance to animals. She was sentenced to a probation period of three years with a $1,000 fine and one hundred hours of community service (A-7; R-3).

Petitioner appealed to Chautauqua County Court, State of New York, where she asserted that her conviction should be overruled, arguing; (1) the trial court's decision to preclude Ms. Pulci solely on the basis of her physical disability constituted discrimination on the part of the prosecutor in violation of Ms. Pulci's right to equal protection under the law and (2) the witness preclusion violated Mrs. Eimers' Sixth and Fourteenth Amendment rights to present a defense of her choosing and call witnesses in her favor, as well as a violation of New York State Constitution Article I, Section 6, securing those same rights under New York law. Specifically, petitioner maintained that, where the trial court precluded Ms. Pulci from testifying based solely on the fear that Ms. Pulci's confinement to a wheelchair would elicit a sympathetic response from the jury, Ms. Pulci's Fourteenth Amendment right to equal protection of the law was violated as she was denied the opportunity to voluntarily participate in the activities of government. Further, in denying Ms. Pulci the right to participate in the activities of government and precluding the jury from hearing testimony crucial to its verdict, Mrs. Eimers asserted that the Court also denied her Sixth Amendment right to present a defense of her choosing and witnesses on her behalf, as well as her Fourteenth Amendment right to due process of law (A-8).

The Honorable John T. Ward entered a decision on March 17, 1999 affirming the trial court's decision to preclude Ms. Pulci from testifying as a character witness. The court

reasoned that Mrs. Eimers' reputation for truthfulness and veracity did not relate to any trait involved in the crime charged. Also, her reputation for kindness and sympathy for injured and terminally ill people did not relate to any trait involved in caring for animals. None of these reasons were advanced by the People or the trial court below (A-3).

A timely application for leave to appeal was filed with New York State Court of Appeals wherein the issue of character witness preclusion as a violation of petitioner's Sixth and Fourteenth Amendment rights was raised. Specifically, Mrs. Eimers asserted a violation of her constitutional right to present a defense, including the guarantee to a criminal defendant of the right of compulsory process to call witnesses in her favor. Additionally, Mrs. Eimers contended that the People had violated Ms. Pulci's right to equal protection of the laws under the Fourteenth Amendment. Petitioner renewed her argument that, by precluding Ms. Pulci's testimony solely on the basis of a physical disability, the prosecutor and the trial court violated Ms. Pulci's constitutional right to equal protection by denying her the opportunity to voluntarily participate in the activities of government (A-85). Leave to appeal was denied by Honorable Judith Kaye, Chief Judge of the New York State Court of Appeals (A-6).

POINT I

PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION TO PRESENT A DEFENSE OF HER CHOOSING AND WITNESSES IN HER FAVOR WERE VIOLATED BY THE TRIAL COURT'S PRECLUSION OF THE TESTIMONY OF A CHARACTER WITNESS ON THE PROSECUTOR'S OBJECTION THAT THE WITNESS' PHYSICAL DISABILITIES MIGHT CREATE SYMPATHY AMONG THE JURORS WHICH MIGHT PREJUDICE THE PEOPLE'S CASE

The prosecutor for Chautauqua County, New York, successfully moved to preclude Ms. Janet Pulci as a character witness for petitioner simply because Ms. Pulci is a terminally ill paraplegic with advanced multiple sclerosis (385). Had Ms. Pulci been permitted to testify, she would have informed the jury that petitioner's reputation in the community was one of veracity and sympathy to the injured and terminally ill, character traits certainly relevant to the animal abuse charges at issue (A-1).

The prosecution objected to Mrs. Eimers' introduction of Ms. Pulci as a character witness solely on the basis of Mrs. Pulci's physical disability, maintaining that her disability would operate only to strike a chord of sympathy in the jury, to the People's disadvantage. The trial court's decision to preclude petitioner's character witness based upon the prosecutor's discriminatory tactics was a violation of Mrs. Eimers' Sixth Amendment right to present a defense and her Fourteenth Amendment due process rights. We ask this court to grant certiorari to review the question of whether Ms. Pulci's testimony was properly excluded.

The Sixth Amendment to the United States Constitution guarantees to a criminal defendant the right of compulsory process

to call witnesses in his favor. As this Court explained in Washington v. State of Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

See also, Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973) ["The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process"].

This right is applicable to the states under the Fourteenth Amendment and is implicated when a defendant is barred from calling witnesses to testify on his behalf. See, Washington v. Texas, supra; People v. Carter, 37 N.Y.2d 234, 239-240, 371 N.Y.S.2d 905, 910 (1975) [". . . the Sixth Amendment to the United States Constitution, obligatory on the States through the due process clause of the Fourteenth Amendment, mandates that the accused has the right to present his own witnesses to establish a defense . . ."]. This Court emphasized that fact in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), noting that:

> Because these [Sixth Amendment] rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed

> by the Fourteenth Amendment to defendants in the criminal courts of the States.

Id. at 818, 95 S.Ct. at 2532 (footnote omitted).

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 1272 (1998); People v. Gilliam, 37 N.Y.2d 722, 374 N.Y.S.2d 616 (1975) rev'g on the dissenting opinion of Justice Hopkins, 45 A.D.2d 744, 356 N.Y.S.2d 663. While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. See, Washington v. Texas, supra, 388 U.S. at 1819, 87 S.Ct. 1920 (1967); see also, Williams v. Florida, 399 U.S. 78, 83 n.14, 90 S.Ct. 1893 (1970). Indeed, the New York Court of Appeals has recognized that federal due process requirements mandate that the testimony of a defendant's witness should not be prospectively excluded unless it is offered in palpably bad faith. People v. Gilliam, supra; see also, People v. Daly, 98 A.D.2d 803, 804, 470 N.Y.S.2d 165, citing Jenkins v. McKeithen, 395 U.S. 411, 429, 89 S.Ct. 1843, 1853 (1969) (citations omitted) ["The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause"].

At the trial court, the judge excluded the testimony of Ms. Pulci based on the People's argument that the defense intended to call Ms. Pulci for the benefit of manipulating the jury and playing on their sympathy in light of her disability. As the Assistant District Attorney stated:

> One of the patients – she probably has somebody terminally ill that's not in a wheelchair. It's all for sympathy. That's all it's meant to do, Your Honor . . . this is a terminally ill paraplegic to illicit sympathy (A-1).

As a general rule, a defendant may introduce "affirmative testimony that the general estimate of his character is so favorable that a jury may infer that he would not be likely to commit the offense charged." Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 219 (1948). As this Court noted in Edgington v. United States, 164 U.S. 361, 363, 17 S.Ct. 72, 72-73 (1896):

> It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crimes with which he is charged.

Proof of good character may be accomplished in the form of reputation evidence summarizing what the witness has heard of the defendant's character in the community. Michelson v. United States, supra, at 477, 69 S.Ct. at 219.

Here, Ms. Pulci would have testified that Mrs. Eimers' reputation in the community was one of veracity and truthfulness and also one of kindness and sympathy to the injured and terminally ill—testimony tending to show that petitioner's character was such that it was unlikely she committed the animal abuse offense charged. Curiously, at the appellate level, the county court affirmed the decision of the trial court and reasoned that Mrs. Eimers' reputation for truthfulness and veracity did not relate to any trait involved in the crime charged even though the prosecution had not objected to Ms. Pulci's testimony on this ground. In addition, the court found that petitioner's reputation did not relate to any trait involved in caring for animals.

The ruling of the County Court was error. Whether a character trait is relevant is determined by asking whether the character trait in question would make any fact of consequence to

the determination of the case more or less probable than it would be without evidence of the trait. Michelson v. United States, supra. Ms. Pulci's proffered testimony was certainly relevant to the character traits at issue during this trial. Petitioner was charged with neglect and maltreatment of animals in her care and her credibility as a witness was in issue. Ms. Pulci's testimony would have apprised the jury of Mrs. Eimers' reputation as a caring and concerned person as well as an honest one and would have placed testimonial evidence before the jury showing that petitioner's reputation in the community was such that it was unlikely that she had committed the charged offense. Edgington v. United States, supra.

Most disturbingly, however, rather than asserting a valid legal objection, the People chose to focus only on how their case would be disadvantaged if a disabled person was allowed to testify for the defense. A prosecutor must be more than an advocate for conviction. He or she is an advocate for justice. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). In exchange for the substantial governmental resources the prosecutor has at his disposal, the system places great trust in the prosecutor to "place the ends of justice above the goal of merely obtaining a conviction." Kirkpatrick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993). Contrary to adhering to his duty to ensure justice is done, the prosecutor in this case sought to preclude an important defense witness simply because she was in a wheelchair. Not only does this render the prosecutor's commitment to fair treatment of the petitioner and the witness suspect, it speaks volumes about the strength of the People's case.

The People engaged in "win at all costs" tactics and, unfortunately, the trial court acquiesced to the prosecutor's bizarre request. The preclusion of the character witness because of her physical disability deprived Mrs. Eimers of both her constitutionally

guaranteed right to present a defense of her choosing and her right to use compulsory process to present an important witness in her favor. Accordingly, these violations of petitioner's rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution warrant the granting of certiorari to remedy deprivations so repugnant to the fundamental rights guaranteed to criminal defendants under the United States Constitution.

POINT II

THE CHARACTER WITNESS' RIGHT TO EQUAL PROTECTION OF THE LAW WAS VIOLATED WHEN SHE WAS DENIED THE RIGHT TO PARTICIPATE IN THE CRIMINAL JUSTICE PROCESS SIMPLY BECAUSE A PROSECUTOR FEARED THAT HER DISABILITIES WOULD CREATE SYMPATHY AMONG THE JURORS WHICH MIGHT PREJUDICE THE PEOPLE'S CASE

The actions of the prosecutor and the trial court also violated the civil rights of the excluded witness, Ms. Pulci. The trial court's preclusion of Ms. Pulci from testifying due solely to the fact that she is confined to a wheelchair infringed upon her right to equal protection under the law.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution specifies that no State may deny any person within its jurisdiction the equal protection of the laws. Likewise, Article 1, §11 of the New York State Constitution provides that:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or

> religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

The New York State Legislature has specifically sought to protect the civil rights of disabled citizens. With the passage of the equal rights provision -- §40-C of the Civil Rights Law -- the Legislature admonished that all persons within the jurisdiction of the state were entitled to equal protection of the laws and specifically provided that:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the Penal Law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state. Civil Rights Law §40-C(2) (emphasis added).

"The term 'civil rights' was understood by the delegates at the 1938 Constitutional Convention to mean 'those rights which pertain to a person by virtue of his citizenship in a state or community.'" People v. Kern, 75 N.Y.2d 638, 651, 555 N.Y.S.2d 647, 653 (1990), quoting, 4 Rev. Record of N.Y. State Constitutional Convention, 1938 (statement of Delegate H.E. Lewis).

The right to be a witness in a criminal action is secured by law. New York State Penal Law §60.20 provides, in relevant part, that "[a]ny person may be a witness in a criminal proceeding unless the Court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence."

Moreover, federal law provides that public entities may not exclude individuals from participation in the activities of government on the basis of a disability. 42 U.S.C. §12132 (the Americans With Disabilities Act). Indeed, this requirement has been specifically applied to the New York State court system. People v. Caldwell, 159 Misc.2d 190, 603 N.Y.S.2d 713, aff'd, ___ A.D.2d ___, 661 N.Y.S.2d 436 (App. Term, 1st Dept. 1997).

Ms. Pulci was denied her right to voluntarily testify on Mrs. Eimers' behalf solely on the basis of her status as a paraplegic. Thus, the action of the trial court, urged by a state prosecutor, deprived her of those civil rights accorded to her by law and denied her the guarantee of equal protection.

The demands of the state and federal equal protection provisions, and sound public policy, mandate the granting of certiorari in this case. The analogy to Batson and its progeny is obvious. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). In Batson, this Court first ruled that exercise of peremptory challenges on the basis of race operated to deprive a criminal defendant of equal protection.

Further, this Court recognized the broad detrimental effects of racial discrimination in jury selection which extend beyond the injury to defendant himself:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try... by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Batson, supra, at 87, 106 S.Ct. at 1718 (citations omitted).

In People v. Kern, supra, the New York Court of Appeals acknowledged the truth of this Batson observation and, in extending Batson to bar racially-based exercise of peremptory challenges by the defense, also provided that a third party could assert a violation of the equal protection rights of a juror. People v. Kern, supra at 654, 555 N.Y.S.2d at 655-56; see also, People v. Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dept. 1990) [male defendant has standing to challenge gender discrimination against female jurors]. The Kern ruling is consistent with this Court's decision in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994) [gender-based exercise of peremptory challenges harms the litigants, the community and the individual jurors -- and violates the Equal Protection Clause].

The same rationale is applicable in the case at bar. Petitioner cannot envision this Court permitting the exclusion of a witness simply because of skin color or gender. Those with disabilities should be treated with the same respect.

Petitioner is entitled to assert Ms. Pulci's right to equal protection of the laws. All of the requirements of third party standing have been met. First, petitioner has a direct interest in achieving vindication of Ms. Pulci's equal protection rights: reversal of her conviction and, ultimately, acquittal after presentation of her complete defense to the jury. See, Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 1370 (1991); People v. Kern, 149 A.D. 2d 187, 234, 545 N.Y.S.2d 4, 33, aff'd 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990).

Second, obstacles exist to Ms. Pulci's ability to vindicate her own rights. NAACP v. Alabama, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170 (1958). In this case, just as with an excluded juror, the discrimination against Ms. Pulci occurred behind closed doors, outside of her presence. Further, since Ms. Pulci was not a party

to the litigation, she was without recourse to complain to the trial court. See also, Powers v. Ohio, 499 U.S. at 411, 111 S.Ct. 1364; People v. Kern, 149 A.D.2d at 234, 545 N.Y.S.2d 33.

Finally, it is unlikely that anyone else will assert Ms. Pulci's constitutional interests. Id. Especially given that the State is the proponent of her exclusion from the judicial process on the basis of her physical disability, this would appear to be the only forum for vindication of her rights. Powers v. Ohio, 499 U.S. at 411, 111 S.Ct. 1364. In light of these circumstances, it is proper for petitioner to seek vindication of the equal protection rights of Ms. Pulci and all others similarly situated.

The disabled are recognized as a protected class in New York State. See, Civil Rights Law §40-C. Indeed, the courts of New York State have recognized that disability should not operate to exclude an individual from participation in the jury process. For example, in People v. Guzman, 76 N.Y.2d 1, 556 N.Y.S.2d 7 (1990), the Court of Appeals ruled that a hearing-impaired person could not be disqualified from service as a juror simply because of his physical disability. Similarly protective of the rights of the disabled, the court in People v. Green, 148 Misc.2d 666 (Westchester Co. 1990), concluded that exercise of a peremptory challenge on the basis of a deaf persons' disability violated the disabled juror's right to equal protection (commenting that such practices would likely run afoul of the Americans With Disabilities Act which, although signed by the President, had not yet come into effect) and allowed assertion of the juror's constitutional interests by the defendant.

There is no reason why the same precepts -- founded upon both federal and state equal protection principles -- should not apply here. The prosecutor's motivation for precluding the witness was premised solely upon her physical disability. Since there was no

evidence demonstrating that she would be incompetent as a witness pursuant to New York CPL §60.20(1), petitioner was entitled to present Ms. Pulci's testimony without concern for the prosecutor's fear that his case might be prejudiced by any potential sympathy effect[2] and the witness was entitled to participate fully in the judicial process by voluntarily testifying in defense of petitioner. The trial court's ruling denied Ms. Pulci equal protection of the law under the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the New York State Constitution by prohibiting her from voluntarily testifying due solely to her disability. The petitioner is entitled to assert a third-party violation of equal protection where the criteria of Powers v. Ohio has been met. Consequently, certiorari should be granted to remedy this unfortunate and egregious denial of federal constitutional protections.

CONCLUSION

The discrimination against the petitioner's character witness on the mere basis of her physical disabilities deprived petitioner of her fundamental Sixth and Fourteenth Amendment rights to present a defense and to compel the testimony of a witness in her favor. The unjustifiable preclusion of Ms. Pulci as a witness simply because she is physically disabled also denied her the equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner respectfully submits that this Court should grant her petition for a writ of certiorari for the purpose of ruling conclusively that a witness may not be precluded from participating

---

[2] Indeed, short of precluding a witness because of her physical disability, the prosecutor could simply have asked that the jury be charged that sympathy should play no part in their deliberations.

in the judicial process -- and in a criminal defendant's defense -- simply because she is physically disabled.

Respectfully submitted,

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(2) Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1999

WENDY J. EIMERS,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THE COURT: Let the record show we're in camera with Mr. Brautigam with Mrs. Eimers, and Mr. Coughlin is here. Go ahead.

MR. BRAUTIGAM: Judge, I just made a request to the court for application to place on the stand Janet Pulci as a character witness for my client. The testimony would be that Mrs. Pulci would testify she is terminally ill with advanced multiple sclerosis.

Mrs. Eimers has been her nurse for the last three years. She has nothing but the highest regard for Mrs. Eimers' abilities, and as far as she knows, Mrs. Eimers' reputation in the community is one of veracity and truthfulness and also that of kindness and sympathy to the injured and terminally ill.

Judge, it's my understanding you've ruled in advance that I cannot call her as a character witness.

MR. COUGHLIN: Your Honor, we just believe it's playing on the jury's sympathy. One of the patients -- she probably has somebody terminally ill that's not in a wheelchair. It's all for sympathy. That's all it's meant to do, Your Honor. It's not --

MR. BRAUTIGAM: Judge, I don't think there is any rule that you can't call to make a --

MR. COUGHLIN: Judge, it's not relevant.

MR. BRAUTIGAM: It goes to her reputation and truth and veracity. I think it --

MR. COUGHLIN: Your Honor, we object. It's highly prejudicial to the People's case.

MR. BRAUTIGAM: All defense --

MR. COUGHLIN: No, Your Honor, it's not all defense. This is highly prejudicial to the People's case. This is a terminally ill paraplegic to elicit sympathy.

MR. BRAUTIGAM: I'm not going to say she's terminally ill or a paraplegic. I'm not looking at it for sympathy. I'm just looking at her, and I know the lady. I've known her most of her life, and I really do not believe that --

THE COURT: I'm not going to allow it.

MR. COUGHLIN: Thank you, Your Honor.

MR. BRAUTIGAM: Thanks, Judge.

(Whereupon, the Judge; Assistant District Attorney, Mr. Coughlin; defense counsel, Mr. Brautigam; and defendant left chambers.)

STATE OF NEW YORK
COUNTY COURT : COUNTY OF CHAUTAUQUA

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

Index No.:

WENDY J. EIMERS,

K1-1997-016735

Defendant

WILLIAM F. COUGHLIN, ESQ.
Assistant District Attorney
Chautauqua County
For the People

ROGER W. WILCOX, ESQ.
Lipsitz, Green, Fahringer, Roll,
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Buffalo, New York 14202
For the Defendant

WARD, J.

DECISION

Defendant appeals her conviction after a jury trial in the Town of Pomfret Justice Court for violating section 353 of the Agriculture and Markets Law: Overdriving, Torturing and Injuring Animals; Failure to Provide Sustenance.

The charge was brought by the New York State Police alleging that defendant was negligently cruel to more than one hundred dogs kept at her residence in overcrowded and unsanitary conditions with little or no shelter for said animals.

Defendant argues, inter alia, that the trial court erred by allowing evidence of a continuing crime. The information alleged that the crime was committed on or about July 23 1996. When the People attempted to offer evidence of the condition of the animals or the kennels prior to July 23, 1996, defendant objected. The court permitted the People to offer such evidence concluding that this was a continuing crime and that the words "on or about" in the information did not limit the People to conduct only on July 23. This court agrees that the People would be hampered in attempting to prove their case if only allowed to present proof of acts occurring on July 23. The conditions testified to by the witnesses did not occur overnight. In order for the jury to obtain an accurate account of the conditions, it was not error for the court to permit the challenged evidence.

Defendant also argues that the conviction was based on legally insufficient evidence. However, after viewing the evidence in a light most favorable to the People, it cannot be said that the evidence was not legally sufficient nor that the verdict is against the weight thereof.

Defendant also argues that the court committed reversible error by not permitting her to call a character witness. The defendant desired to call a character witness who was confined to a wheelchair as a result of advanced multiple sclerosis. The defendant had been the witness' nurse for the three years prior to the trial. The defendant desired to call the witness to testify as to her reputation in the community for veracity and truthfulness and also for kindness and sympathy to the injured and terminally ill. The People objected to the character witness' testimony on the ground that it was designed to elicit sympathy for the defendant. The court sustained the People's objection to the character testimony and

prohibited the defense from introducing her character through that witness.

In most cases, the determination as to whether or not the probative value outweighs the prejudicial value of a character witness as well as the relevancy of the character trait in issue is best left to the sound discretion of the trial court. Here, the defendant's reputation for truthfulness and veracity did not relate to any trait involved in the crime charged. As for her reputation for kindness and sympathy for injured and terminally ill people, this court cannot say that the trial court erred in determining that that reputation did not relate to any trait involved in caring for animals.

I have considered the defendant's remaining points on appeal and find them to be without merit.

Accordingly, the judgment of conviction in the Town of Pomfret Justice Court is, in all respects, affirmed.

This constitutes the decision and order of the court.

Dated: March 17, 1999
Mayville, New York

/s/
Hon. John T. Ward
County Court Judge

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

CERTIFICATE DENYING LEAVE

WENDY J. EIMERS,

Appellant.

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of new York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
October 1, 1999

/s/
Chief Judge

* An Order of County Court, Chautauqua County, entered March 17, 1999, affirming a conviction of Justice Court, Town of Pomfret.

* Description of Order:

STATE OF NEW YORK : COUNTY OF CHAUTAUQUA
JUSTICE COURT : TOWN OF POMFRET

THE PEOPLE OF THE STATE OF NEW YORK
against
WENDY J. EIMERS
(DOB 4/24/46) Defendant

CERTIFICATE OF CONVICTION

This is to certify that a Judgment of Conviction has been entered in this court, before the Hon. **DAVID A. PRINCE**, a Judge-Justice of this Court, on the **20TH** day of **MAY**, **1997**, convicting the above named defendant of the offense of **AG. & MKT. SECTION 353 - OVERDRIVING INJURING ANIMALS, FAILURE TO PROVIDE PROPER SUSTENANCE** and sentence was imposed as follows, **PROBATION FOR A PERIOD OF 3 YEARS, $1,000.00 FINE - 100 HOURS OF COMMUNITY SERVICE**

Dated at:
FREDONIA, N.Y.
this **11TH** day of **SEPTEMBER**, 1997

/s/
Justice
DAVID A. PRINCE

To be Argued by:
Roger W. Wilcox, Jr.
Estimated Time for Argument:
15 Minutes

STATE OF NEW YORK
COUNTY COURT : COUNTY OF CHAUTAUQUA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff/Respondent,

vs.

WENDY J. EIMERS,

Defendant/Appellant.

BRIEF FOR APPELLANT UPON CONVICTION FROM TOWN OF POMFRET COURT

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QUESTIONS PRESENTED

1. Did the trial court err by precluding the testimony of the disabled witness?

2. Did the trial court err by allowing evidence of a continuing crime?

3. Did the trial court err when it admitted evidence of alleged prior bad acts of appellant?

4. Did the trial court err with respect to the People's obligation under §30.30?

5. Did the trial court err wit respect to its ruling under the meaning of CPL §170.35(1)(a)?

6. Did the trial court err by allowing the admission of non-legal standards?

7. Did the trial court err with respect to the late hour of jury deliberations?

8. Did the trial court err in permitting the conviction to stand on insufficient evidence?

PROCEDURAL HISTORY

The arrest of appellant occurred on July 31, 1996. Appellant was charged with cruelty to animals in violation of §353 of the Agriculture and Markets Law.

On September 6, 1996 the People on their own motion dismissed the charges against the defendant without prejudice and refiled new charges in the Town Court of Pomfret on September 16, 1996.

Appellant was arraigned on the new charges on September 17, 1996 and entered a plea of not guilty.

On May 19, 1997, the appellant was convicted after trial by jury in the Town of Pomfret Justice Court, County of Chautauqua, Hon. David A. Prince presiding, of one count of overdriving, injuring animals, failure to provide proper sustenance (Agriculture and Markets Law §353). The appellant was sentenced on August 5, 1997 to three years probation with the condition that she have no dogs or cats on her property during her probation term, one hundred hours community service, a $90.00 special assessment fee, and a $1,000 fine payable at the rate of $200 per month. On August 7, 1997 a Notice of Appeal was filed on Mrs. Eimers' behalf from the aforesaid judgment of conviction. The said Notice of Appeal was timely filed.

STATEMENT OF FACTS

This appeal, submitted on behalf of Wendy J. Eimers, arises out of her conviction of alleged animal cruelty on or about July 23, 1996 at her dog kennel located in the backyard of her residence in Jamestown, New York. Principally, the government claimed that Mrs. Eimers over-drove, tortured and injured animals and failed to provide proper sustenance on or about July 23, 1996. As will be explained below, the primary issue in this case is whether Mrs. Eimers intentionally hurt the dogs that she raised, or whether the evidence amounted simply to a kennel that smelled like a kennel.

Mrs. Eimers, a fifty-one year old Jamestown resident, and a registered nurse of thirty-one years at the time of trial, is married and has eight children varying from eleven to twenty-nine years of age (324).[1] Mrs. Eimers began working as a registered nurse after

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[1] Parenthetical numerical references are to pages of the Record.

she graduated from Jamestown Community College in 1966. She stopped working in that capacity for about ten years so she would be able to raise her children with her undivided attention. Soon thereafter, her husband became disabled and Mrs. Eimers became the primary bread winner for her family (325).

Because of Mrs. Eimers' love for animals and her desire to care for sick, stray animals, she and her husband constructed a kennel in their backyard in order to fulfill her dream. From her home Mrs. Eimers was able to house dogs that no one else wanted and raise dogs for sale (310, 348). On July 23, 1996, her dream became a nightmare.

Ms. Holly Loffland, from the American Kennel Club, phoned Mrs. Eimers at her home on July 22, 1996 to inform her that she would be coming to her house on July 23, 1996 to review her records (119). Although Mrs Eimers was unaware that Ms. Loffland was going to do a walk through of the kennels, she was more than accommodating when Ms. Loffland made her request (329).

Ms. Loffland noticed that two dogs appeared to be fighting and barking in the first pen that she observed (214). She did not state that the dogs were injured or lacked food or water.

The next kennel contained Westie's white dogs. Ms. Loffland noticed food accumulated on the ground (214). She also noticed fecal matter on the floor (214). Once again, she did not state that the Westie's were without food and water or that they appeared beaten or injured.

The third kennel also contained Westie's (215). Again, no testimony was provided from Ms. Loffland indicating a lack of food or water or that any dog appeared to be injured.

Ms. Loffland stated that some of the runs had earth floors (217). She also stated that some dogs had matted coats (218). However, she never testified that these dogs were injured or lacked proper food or water.

During their tour of the yard, Mrs. Eimers pointed out to Ms. Loffland some of her concerns with regard to the dogs, and she also sought advice (331). Specifically, she pointed out that some of the cocker spaniels that she had recently purchased from Mr. Powlowski were matted, because he never paid proper attention to them (331). When Mrs. Eimers had attempted to remove the matts from the dogs, it was hard for her to control them (332). She informed Ms. Loffland that she was going to give the dogs some dramamine and try to trim them, and if that failed, her next step was to give them a small dose of valium (332).

Most notably, Ms. Loffland stated that each pen appeared to have been supplied with a water bucket (221). She stated that some of the buckets had been spilled or appeared to be empty (222). She never stated how the buckets became empty or why the buckets were empty - perhaps some of the buckets were empty because the dogs had drank prior to her arrival. Also, Mrs. Eimers was in full compliance with the AKC record keeping and lineage records (210).

Mrs. Eimers also sought Ms. Loffland's expertise with regard to her golden retriever that had a sore on its nose. Ms. Loffland informed Mrs. Eimers that a salve-like substance called Squat could be therapeutic for the golden retriever's nose (342). Mrs. Eimers subsequently applied the Squat to the dog's nose to aid in the healing process. The salve that Ms. Loffland recommended was the same type of salve that she used herself on her own shepherd (268). Ms. Loffland never stated that the golden retriever had been abused or lacked food or water.

Another area of the kennel that Ms. Loffland inspected was the whelping room, although she remained six feet from the building during the inspection (344). Although Ms. Loffland stated that she personally disliked the construction of the cages and the way they were set up she never stated that any of the dogs in the whelping room were abused or appeared injured. During her inspection, Ms. Loffland found fecal matter in many of the cages (221). In that regard, Mrs. Eimers agreed that the fecal matter in some of the pens was probably a day old (334).

Ms. Loffland noticed various breeds of dogs throughout the run (216). Mostly in the ground pens were medium to large dogs, cocker spaniels, poodles, golden retrievers and two St. Bernards. Some kennels appeared to have round, plastic, empty barrels in them, while some pens had a type of doghouse called an igloo (217). Some of the kennels had half of an igloo or half of a dog crate in them, which is common for large breed dogs (217).

Upon leaving the Eimers' residence, Ms. Loffland never issued Mrs. Eimers a warning letter indicating that her premises were in violation of any regulations (251). In fact, the first written statement Ms. Loffland issued to a law enforcement agency with regard to the condition of the Eimers' kennel was on September 13, 1996 (255). Obviously, Ms. Loffland did not feel a sense of urgency with reporting the condition of the kennel because she waited nearly fifty-two (141) days before contacting law enforcement (255). In fact, this was nearly two months after her inspection.

Ms. Ruth Ann Moscato was a neighbor of Mrs. Eimers and has lived on Chautauqua Road for approximately thirty years. From the backyard of her property she could see a couple of the kennels in the Eimers' yard (119). From a distance she noticed that the

kennels were open, and she could observe the dogs in the kennels (120). The kennels were located about fifty feet or less from the Moscato's property line and occasionally she could smell dog waste (121). She could also hear dogs barking, but she was not sure if she heard barking on July 23, 1996 (122). The main reason she never went to the Eimers' house was because she is afraid of dogs (125).

Ms. Moscato could not recall anything specific about July 23, 1996, other than the fact that it was a Wednesday (130). More importantly, she never called anyone from the Town of Pomfret to lodge a complaint concerning the conditions of the Eimers' kennel (130). She did not testify that Mrs. Eimers was abusive to her animals or that she failed to provide food and water to the dogs.

Michiah Thomas Wojcinski lived a couple of houses away from the Eimers, and had lived there for fifteen years (133). He was a seventeen year old Fredonia High School student in the eleventh grade (134). On July 23, 1996 his mother requested that he go to Mrs. Eimers' house to receive two dogs that Mrs. Eimers had offered to the Wojcinski family (134). When Michiah arrived at Mrs. Eimers' house he received one poodle and one male chihuahua, free of charge (135, 347). The poodle was an older dog which had some teeth and fingernails missing. The foreskin over the penis of the chihuahua seemed to be missing (138). Mrs. Eimers did attempt to treat the chihuahua with the penis problem prior to offering it to the Wojcinskis (346). Mrs. Roseann Wojcinski, the mother of Michiah also attempted to treat the chihuahua's penis with Bag Balm. Michiah did not recall anything specific with regard to July 23, 1996. In fact, he testified that he received the dogs up to a week before July 23, 1996 (143).

Mrs. Wojcinski lived approximately 450 feet from the Eimers, and there were two houses in between her house and Mrs. Eimers. Mrs. Wojcinski recalled frequent barking coming from the Eimers' kennel (168). She also recalled the smell of dog waste being relatively strong on occasion (168). Further, Mrs. Wojcinski testified to the sound of yelping dogs, and although she is not a veterinarian, she was allowed to testify at trial that the sound was that of a dog in need of attention (170). She, too, did not recall exactly what she was doing on July 23, 1996, nor the condition of the Eimers' kennel (180). Specifically, she did not testify to abusive conduct on the part of Mrs. Eimers or that the dogs lacked food or water.

Paul Switzer lived down the hill from the Eimers and across the street (181). He had been active in the gathering of names on a petition to stop the Eimers from running their kennel business (182). Mr. Switzer claimed that he could hear the sound of dogs barking from his house nearly 1,000 feet away (183). He recalled smelling dog waste from July 21st to July 23rd because the temperatures during that period were extremely hot (184). Mr. Switzer further remembered some barking on July 23, 1996 (186). However, Mr. Switzer never contacted the authorities or the Chautauqua County Sheriff's Department to lodge a complaint against the Eimers with regard to the condition of their kennel (198). No testimony was provided by Mr. Switzer concerning abuse or mistreatment or the failure to provide food or water.

Although the kennel business belonged to Mrs. Eimers, Mr. Eimers took care of much of the cleaning of the kennel throughout the day (290). He also engaged in some of the sales of the puppies (291). The Eimers' ultimate intent was to find dogs that were healthy so they could use them in their business (310). Some

dogs she just took because they were homeless - some blind, some old (3488).

Beverly Pannus, who lived in Fredonia on West Main Road, had a kennel at her residence (383). Ms. Loffland inspected Ms. Pannus' kennel on July 23, 1996 after her inspection of the Eimers' kennel was completed (383). Ironically, Ms. Pannus was informed by Ms. Loffland that she should fashion some of her cages like those of Mrs. Eimers'. Ms. Loffland particularly liked Mrs. Eimers' dog cages that were constructed like hutches (383). No further proof was submitted.

POINT I

THE TRIAL COURT'S PRECLUSION OF TESTIMONY FROM APPELLANT'S CHARACTER WITNESS AT THE PEOPLE'S REQUEST ON THE BASIS OF THE WITNESSES' PHYSICAL DISABILITY VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS AND DENIED THE WITNESS EQUAL PROTECTION OF THE LAW

The trial court's decision to preclude Mrs. Eimers' character witness based upon her disability was a violation of Mrs. Eimers' Sixth Amendment and due process rights and as such, her conviction should be overruled. Specifically, the prosecutor objected to Mrs. Eimers' presentation of Ms. Janet Pulci as a character witness on the ground that the jury would be sympathetic to her because of a crippling condition which had confined her to a wheelchair (285).

Defense counsel made it overwhelmingly clear to the Court and the Assistant District Attorney that he intended to call Ms. Pulci as a character witness and that he did not intend to interject anything about her physical condition (385-386). In particular, Ms. Pulci would have testified that:

> Mrs. Eimers had been her nurse for the last three years. She has nothing but the highest regard for Mrs. Eimers' abilities, and as far as she knows, Mrs. Eimers' reputation in the community is one of veracity and truthfulness and also that of kindness and sympathy to the injured and terminally ill (385).

The rule has long been that in a criminal prosecution the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the offense charged. People v. Aharonowicz, 71 N.Y.2d 678, 681, 529 N.Y.S.2d 736, 737 (1988) (per curiam); see, e.g., People v. Bonton, 50 N.Y.2d 130, 138-139, 428 N.Y.S.2d 218, 222 (1980). In that respect the evidence offered by the appellant must be probative of a character trait related to the crime charged. People v. Van Gaasbeck, 189 N.Y. 408, at 414-416, 82 N.E. 718, at 719-720 (1907).

It is axiomatic that a defendant has a constitutional right to present a defense. People v. Hudy, 73 N.Y.2d 40, 538 N.Y.S.2d 187 (1988). It has long been recognized that when the Court denies the appellant his right to call a witness on his behalf, defendant's constitutional rights are invaded. (Chambers v. Mississippi, 410 U.S. 284, 294, 302, 93 S.Ct. 1038, 1045, 1049 (1973); People v. Foy, 32 N.Y.2d 473, 346 N.Y.S.2d 245 (1973); People v. Cuevas, 67 A.D.2d 219, 414 N.Y.S.2d 520 (1st Dept. 1979)).

The Sixth Amendment to the United States Constitution and Article I, Section 6 of the New York State Constitution guarantee to a criminal appellant the right of compulsory process to call witnesses in his favor. See, Ronson v. Commissioner of Correction of the State of New York, 604 F.2d 176 (2d Cir., 1979). This right is applicable to the states under the fourteenth amendment and is implicated when an appellant is barred from calling witnesses to testify on his behalf. See, Washington v. Texas, 388 U.S. 14, 19, 22, 87 S.Ct. 1920 (1967); Singleton v. Lefkowitz, 583 F.2d 618, 623 (2d Cir., 1978), cert. den., 440 U.S. 929, 99 S.Ct. 1266; United States v. Melchor Moreno, 536 F.2d 1042, 1046 (5th Cir., 1976); see also, People v. Carter, 37 N.Y.S.2d 234, 239-240, 371 N.Y.S.2d 905, 910 (1975) ["... the Sixth Amendment to the United States Constitution, obligatory on the States through the due process clause of the Fourteenth Amendment, mandates that the accused has the right to present his own witnesses to establish a defense..."].

"It is clear that the right to present evidence by witnesses of one's own choosing is a fundamental ingredient of due process." People v. Gilliam, 37 N.Y.2d 722, 374 N.Y.S.2d 616 (1975) rev'g on the dissenting opinion of Justice Hopkins, 45 A.D.2d 744, 356 N.Y.S.2d 633. While an appellant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. See, Washington v. Texas, supra, 388 U.S. at 1819, 87 S.Ct. 1920 (1967); see also, Williams v. Florida, 399 U.S. 78, 83 n.14, 90 S.Ct. 1893 (1970). Indeed, the Court of Appeals has said that the testimony of a defendant's witness should not be prospectively excluded unless it is offered in palpably bad faith. People v. Gilliam, supra; People v. Daly, 98 A.D.2d 803, 804, 470 N.Y.S.2d 165 (2nd Dept. 1983), aff'd 64 N.Y.2d 970, 489 N.Y.S.2d 35.

In the case of People v. Hepburn, 52 A.D.2d 958, 383 N.Y.S.2d 626 (2nd Dept. 1976), the Appellate Division concluded that the lower court's ruling excluding a defense witness constituted reversible error, and emphasized the fundamental right recognized by the United States Supreme Court and the New York State Court of Appeals of a criminal defendant to present evidence from witnesses of his own choosing. See, Jenkins v. McKeithen, supra; People v. Gilliam, supra. The Second Department reaffirmed that absent a showing that the offer is made in palpable bad faith, no court shall preclude any witness from testifying. See, People v. Gilliam, supra.

A similar decision was reached by the Third Department in People v. Prentice, 208 A.D.2d 1064, 617 N.Y.S.2d 570, app. dismissed 84 N.Y.2d 1037, 623 N.Y.S.2d 193 (1994). There, the appellate court reversed felony convictions in light of the county court's refusal to allow the defendant to present the testimony of a favorable police witness. In so doing, the Third Department underscored the Court of Appeals' affirmation in Hudy, supra, that a defendant has a constitutional right to present a defense and reiterated that a defense witness must not be excluded if the proffered testimony would be relevant and is offered in good faith. People v. Prentice, supra at 1065, 617 N.Y.S.2d at 571 see also, People v. Forbes, 87 A.D.2d 829, 449 N.Y.S.2d 9 (2d Dept. 1982) [where the Appellate Division reversed and ordered a new trial, finding that the trial court erred when it precluded testimony from a defense witness offered in good faith].

In connection with a defendant's absolute right to introduce character evidence, the New York Court of Appeals in People v. McDowell, 9 N.Y.2d 12, 210 N.Y.S.2d 514 (1961), explained that:

> It is well settled that in a criminal prosecution, the appellant may introduce evidence as to his own character for the purpose of raising an inference that he would not be likely to commit the offense charged. People v. Van Gaasbeck, 189 N.Y. 408 [82 N.E. 718, 22 L.R.A.,N.S., 650]...; Cancemi v. People, 16 N.Y. 501. (Richardson, Evidence [8th ed.], §154; 7 Wigmore, Evidence [3d ed.], §1981.)

Id. at 14, 210 N.Y.S.2d at 514. The Court went on to state:

> Objections to the exclusion of character evidence cannot be taken lightly. "This Court has frequently stated that evidence of good character is a matter of substance; [sic] not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt, even when the evidence against the defendant may be convincing." People v. Colantone, 243 N.Y. 134, 136, 152 N.E. 700, 701; People v. O'Regan, 221 App.Div. 331, 223 N.Y.S. 339. Indeed, the value of such testimony has pointed up by our rules as to the effect of evidence of good character. People v. Trimarchi, 231 N.Y. 263, 131 N.E. 910; see also, People v. Johnson, 5 N.Y.2d 1000, 184 N.Y.S.2d 861.

Id. at 14, 210 N.Y.S.2d at 515.

Most notably, the McDowell Court concluded that the prejudice suffered by the appellant as a result of the exclusion of the character evidence entitled him to a new trial.

Here, the People contended only that the defense intended to call Ms. Pulci for the benefit of manipulating the jury and playing

on their sympathy in light of her disability (385). As the Assistant District Attorney stated:

> One of the patients -- she probably has somebody terminally ill that's not in a wheelchair. It's all for sympathy. That's all it's meant to do, Your Honor (385)... this is a terminally ill paraplegic to illicit sympathy (386).

The People's argument was without merit. Ms. Pulci's proffered testimony was certainly relevant to character traits at issue during this trial. Mrs. Eimers was charged with neglect and maltreatment of animals in her care and her credibility was in issue. Ms. Pulci's testimony would have apprised the jury of Mrs. Eimers' reputation as a caring and concerned person as well as an honest one (385).

Most disturbingly, rather than asserting a valid legal objection, the People chose to focus only on how their case would be disadvantaged if a disabled person was allowed to testify for the defense. Contrary to adhering to his duty to ensure justice is done, People v. Pelchat, 62 N.Y.2d 97, 106, 476 N.Y.S.2d 79 (1984), the prosecutor sought to preclude an important defense witness simply because she was in a wheelchair. Not only does this render the prosecutor's commitment to fair treatment of the defendant and the witness suspect, it speaks volumes about the strength of the People's case.

The People engaged in "win at all costs" tactics and, unfortunately, the trial court acquiesced to their bizarre request. The preclusion of the character witness deprived Mrs. Eimers of her constitutionally guaranteed right to present a defense of her choosing. Faretta v. California, 422 U.S. 806, 818, 95 S.Ct. 2525,

2533 (1975), and to present witnesses in support of her defense. See also, People v. DiGina, 72 N.Y.2d 768, 537 N.Y.S.2d 8 (1988). Consequently, this violation of Mrs. Eimers' fundamental rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the corresponding New York State Bill of Rights protections mandates reversal of her conviction and granting of a new trial.

Furthermore, the actions of the prosecutor and the Court violated the civil rights of the excluded witness. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution specifies that no State may deny any person within its jurisdiction the equal protection of the laws. Likewise, Article 1, §11 of the New York State Constitution provides that:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

"The term 'civil rights' was understood by the delegates at the 1938 Constitutional Convention to mean 'those rights which pertain to a person by virtue of his citizenship in a state or community.'" People v. Kern, 75 N.Y.2d 638, 651, 555 N.Y.S.2d 647, 653 (1990), quoting, 4 Rev. Record of N.Y. State Constitutional Convention, 1938 (statement of Delegate H.E. Lewis).

The Legislature has specifically sought to protect the civil rights of disabled citizens. With the passage of the equal rights provision -- §40-C of the Civil Rights Law, the Legislature

admonished that all persons within the jurisdiction of the state were entitled to equal protection of the laws and specifically provided that:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the Penal Law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state. Civil Rights Law §40-C(2) (emphasis added).

The right to be a witness in a criminal action is secured by law. Penal Law §60.20 provides, in relevant part, that "[a]ny person may be a witness in a criminal proceeding unless the Court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence."

Ms. Pulci was denied her right to voluntarily testify on Mrs. Eimers' behalf solely on the basis of her status as a paraplegic. Thus, the action of the trial court, urged by a state prosecutor, deprived her of those civil rights accorded to her by law and denied her the guarantee or equal protection.

The demands of the state and federal equal protection provisions, and sound public policy, mandate a reversal in this case. The analogy to Batson and its progeny is obvious. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). As the Court is undoubtedly aware, in Batson the Supreme Court first ruled that

exercise of peremptory challenges on the basis of race operated to deprive a criminal defendant of equal protection.

Further, the Batson Court recognized the broad detrimental effects of racial discrimination in jury selection which extend beyond the injury to defendant himself:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try... by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Batson, supra, at 87, 106 S.Ct. at 1718 (citations omitted).

In People v. Kern, supra, the Court of Appeals acknowledged the truth of this Batson observation and, in extending Batson to bar gender-based exercise of peremptory challenges, also provided that a third party could assert a violation of the equal protection rights of a juror. People v. Kern, supra at 654, 555 N.Y.S.2d at 655-56; see also People v.Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dept. 1990) [male defendant has standing to challenge gender discrimination against female jurors]. The Kern ruling is consistent with the Supreme Court's decision in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994) [gender-based exercise of peremptory challenges harms the litigants, the community and the individual jurors -- and violates the Equal Protection Clause].

The same rationale is applicable in the case at bar. Appellant cannot envision this -- or any -- Court permitting the

exclusion of a witness simply because of skin color or gender. Those with disabilities should be treated with the same respect.

Appellant is entitled to assert Ms. Pulci's right to equal protection of the laws. All of the requirements of third party standing have been met. First, appellant has a direct interest in achieving vindication of Ms. Pulci's equal protection rights: reversal of her conviction and, ultimately, acquittal after presentation of her complete defense to the jury. See, People v. Kern, 149 A.D. 2d 187, 234, 545 N.Y.S.2d 4, 33, aff'd 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990); see also, People v. Gary M., 138 Misc.2d 1081, 526 N.Y.S.2d 986 (Kings Co. 1988) [cited approvingly by the Court of Appeals in Kern].

Second, obstacles exist to Ms. Pulci's ability to vindicate her own rights. NAACP v. Alabama, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170 (1958). In this case, just as with an excluded juror, the discrimination against Ms. Pulci occurred behind closed doors, outside of her presence. Further, since Ms. Pulci was not a party to the litigation, she was without recourse to complain to the trial court. See also, People v. Kern, 149 A.D.2d at 234, 545 N.Y.S.2d 33.

Finally, it is unlikely that anyone else will assert Ms. Pulci's constitutional interests. Id. Especially given that the State is the proponent of her exclusion from the judicial process on the basis of her physical disability, this would appear to be the only forum for vindication of her rights. People v. Gary M., supra, at 1092, 526 N.Y.S.2d at 996. In light of these circumstances, it is proper for appellant to seek vindication of the equal protection rights of Ms. Pulci and all others similarly situated.

The disabled are recognized as a protected class in New York State, Civil Rights Law §40-C. Moreover, federal law provides that public entities may not exclude individuals from participation in the activities of government of the basis of a disability. 42 U.S.C. §12132 (the Americans With Disabilities Act). Indeed, this requirement has been specifically applied to the court system. People v. Caldwell, 159 Misc.2d 190, 603 N.Y.S.2d 713, aff'd, A.D.2d, 661 N.Y.S.2d 436 (App. Term, 1st Dept. 1997).

Furthermore, the courts of this State have recognized that disability should not operate to exclude an individual from participation in the jury process. For example, in People v. Guzman, 76 N.Y.2d 1, 556 N.Y.S.2d 7 (1990), the Court of Appeals ruled that a hearing-impaired person could not be disqualified from service as a juror simply because of his physical disability. Similarly protective of the rights of the disabled, the court in People v. Green, 148 Misc.2d 666 (Westchester Co. 1990), concluded that exercise of a peremptory challenge on the basis of a deaf persons' disability violated the disabled juror's right to equal protection (commenting that such practices would likely run afoul of the Americans With Disabilities Act which, although signed by the President, had not yet come into effect) and allowed assertion of the juror's constitutional interests by the defendant.

There is no reason why the same precepts should not apply here. The prosecutor's motivation for precluding the witness was premised upon her physical disability. Since there was no evidence demonstrating that she would be incompetent as a witness pursuant to C.P.L §60.20(1), appellant was entitled to present Ms. Pulci's testimony without concern for the prosecutor's unhappiness with any

potential sympathy effect[2] and the witness was entitled to participate fully in the judicial process by voluntarily testifying in defense of appellant.

The trial court's preclusion of Ms. Pulci's testimony at the request of the People violated appellant's Sixth Amendment and due process rights to present a defense of her choosing by excluding relevant and important character evidence. The Court's ruling also denied Ms. Pulci equal protection of the law. Accordingly, appellant's conviction must be dismissed and a new trial ordered.

POINT II

THE TRIAL COURT ERRED IN APPLYING A CONTINUING CRIMES THEORY TO APPELLANT'S SEVERE PREJUDICE

As the Court is well aware, the People charged the appellant in violation of §353 of the Agricultural and Markets Law. Specifically, the Information stated that:

> "...accuses Wendy J. Eimers the above mentioned defendant(s), with having committed the [misdemeanor] of Overdriving, Injuring Animals, Fail to Provide Proper Sustenance in violation of §353,... of the Agriculture and Markets Law of the State of New York. That on or about the 23rd day of July, 1996, at about 10:00 a.m. in the Town of

[2] Indeed, short of precluding a witness because of her physical disability, the prosecutor could simply have asked that the jury be charged that sympathy should play no part in their deliberations. E.g., CJI 620.

> Pomfret, County of Chautauqua, the defendant(s) did [intentionally], [knowingly], and unlawfully, commit the misdemeanor of overdriving, injuring animals, fail to provide proper sustenance." (Emphasis added).

Although the People clearly charged the appellant in violation of §353 of the Agriculture and Market Law on a specific time and day, specifically "at about 10:00 a.m." "on or about July 23, 1996" the Court allowed the introduction of incriminating evidence with respect to other occurrences and times not charged in the Information. Unfortunately, under protest by defense counsel, while ruling that the charge would be treated as a continuing crime, the trial court refused to rule in advance of proof as to the parameters of a designated period (85-86).

Michiah Wojcinski was able to testify over defense counsel's objection to prior bad acts which served to show a propensity for Mrs. Eimers to commit the crime charged on July 23, 1996. On direct examination by the prosecutor, he testified in relation to two dogs (a poodle and a chihuahua), that Mrs. Eimers had given to him as a gift (133-148) within a week of July 23, 1996 (143). One dog had an exposed penis and the other had matted and dirty hair. This evidence served to demonstrate that Mrs. Eimers had a propensity to commit the activity alleged in the information on or about July 23, 1996. Moreover, this evidence was extremely prejudicial to the appellant's defense structured around July 23, 1996.

On another occasion in the course of the trial, the Judge allowed Ruth Ann Moscato to testify to general conditions of Mrs. Eimers' property without reference to July 23, 1996, as the information charges (120). Further, the Court allowed Mrs. Wojcinski to testify how she often heard yelping sounds

coming from the kennels, as if some of the animals were hurt (170). This testimony was not with regard to July 23, 1996, specifically. Instead, the testimony referred to the sound of yelping dogs without any temporal parameters provided for the testimony (170).

Similarly, with regard to Paul Switzer's testimony, over defense counsel's objection the Court allowed Mr. Switzer to testify to both specific and general conditions of Mrs. Eimers' kennels over the prior couple of years (182). Specifically, the Court stated, "let's see what he says about the last couple of years, then we can strike it." (183). Mr. Brautigam clearly objected to the Judge's statement that he would allow such testimony and then strike it. The Court overruled the objection and allowed Mr. Switzer to testify to the fact that he has had to put up with a great deal of barking, night and day (183). Once again, Mr. Brautigam objected, and the Judge sustained and informed the jurors, "You can't answer that. Strike that from your minds." Obviously, the damage was done.

Interestingly, as the trial progressed, the Court began to sustain Mr. Brautigam's objections to introducing evidence that did not pertain to July 23, 1996 (190). For example, Mr. Switzer testified that some cages had no protection, and that he had seen days when it was 90 degrees, and days with absolutely nothing over the dogs. He's also seen dogs that stand in the <u>snow</u> and out there with no protection (190). Here the Court sustained Mr. Brautigam's objection and stated, "Wait a minute. It only pertains to July 23rd. Any date -- Christ, I hope it doesn't snow on July 23rd." (190). The Judge then struck that from the record.

Paradoxically, within the next minute, the Judge ruled that it's a continuing act and we're not just talking about July 23rd (191). Obviously, the Court was inconsistent with its ruling as to whether the alleged violation should be treated as a continuing

crime, occurring over a significant period of time, or whether it should be treated as charged, "on or about July 23, 1996". In any event, the evidence the Court allowed before the jury which did not pertain to the alleged conduct on or about July 23, 1996 was remarkable and highly prejudicial.

It has long been held that the importance of specificity in the information as to "the time and place and nature and circumstances of the offense" is to provide the appellant "with all reasonable knowledge and ability" and to have "full notice of the charge" so that the appellant is able to formulate his defense. See, People v. Morris, 61 N.Y.2d 290, 295, 473 N.Y.S.2d 769 (1984), quoting from United States v. Cruikshank, 92 U.S. 542, 566. Each count in a charging instrument must state "that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time." (C.P.L. §200.50[6]). This requirement, along with others set forth in C.P.L. §200.50 serves three purposes: (1) to provide the accused with fair notice of the charge against him so that he may prepare his answer and defense to the charge; (2) to ensure that the crime for which appellant it tried before the petit jury is in fact the crime with which he was charged; and (3) to identify the criminal conduct with sufficient specificity so that appellant, if convicted, may raise a double jeopardy claim as to bar subsequent prosecution for the same conduct (see, People v. Sanchez, 84 N.Y.2d 440, 445, 618 N.Y.S.2d 887 (1994), see also, People v. Charles, 61 N.Y.2d 321, 326-327, 473 N.Y.S.2d 941 (1984); People v. Iannone, 45 N.Y.2d 589, 594, 412 N.Y.S.2d 110 (1978)).

Moreover, when a defendant is charged with a crime that is perpetrated by commission of a single act and time is not a substantive element of the crime charged, the allegation of when the act was committed must be reasonably specific in light of all the

circumstances of the particular case (See, People v. Morris, 61 N.Y.2d 290, 295-296, 473 N.Y.S.2d 769 (1984); see also, People v. Keindl, 68 N.Y.2d 410, 419-420, 509 N.Y.S.2d 790 (1986)).

Significantly, when a crime may be committed by multiple acts over time and is amendable to characterization as a "continuing crime", the count in the charging instrument may properly allege that the single offense was committed over a significant period of time (see, People v. Keindl, 68 N.Y.2d, at 421-422, 509 N.Y.S.2d 790; see also, People v. First Meridian Planning Corp., 86 N.Y.2d 608, 615-616, 635 N.Y.S.2d 144, 147-148 (1995)).

A continuing crime is one "that by its nature may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time." (People v. Keindl, supra, at 421, 509 N.Y.S.2d 790). Whether multiple acts may be charged as a continuing crime is resolved by reference to the language in the Penal Statue to determine whether the statutory definition of the crime necessarily contemplates a single act. See, People v. Keindl, supra, at 421-422, 509 N.Y.S.2d 795; see also, Matter of Johnson v. Morgenthau, 69 N.Y.2d 148, 512 N.Y.S.2d 797 (1987). Guidance is also obtained from analysis of whether the legislature intended to prohibit a course of conduct or only specific, discreet acts (see, People v. Okafore, 72 N.Y.2d 81, 86-87, 531 N.Y.S.2d 762 (1988)). The "continuing crime" theory allows prosecutors charged with the duty of prosecuting crimes composed of multiple acts to plead a designated period of time within which the acts are alleged to have occurred. People v. Keindl, supra. For example, a defendant may be guilty of a crime based on proof of a series of acts which, when viewed individually, may not constitute an offense, but taken together make out the crime. Id. Thus, the prosecutor in such a situation would plead that the offense occurred over a designated period of time.

In this case, however, the People pled a single date, not a period of days or weeks (4). Clearly, the information as worded was sufficient to provide the appellant with reasonable and adequate notice to enable her to prepare her defense to the allegation that the crime charged occurred on one day. As previously stated, the information charged the appellant with allegedly committing acts in violation of §353 of the Agriculture and Markets Law on or about July 23, 1996 at approximately 10:00 a.m. Thus, the appellant had prepared her defense with regard to the allegations concerning her conduct on July 23, 1996. The continuing crime theory does not apply to this case.

In addition to refusing to rule in advance as to whether the continuing crime theory applied (98-99) (thereby exacerbating the surprise and prejudice to the defense that this theory might suddenly be applied), the trial court's inconsistent and confusing ad hoc rulings precluded a comprehensible defense. Defense counsel did not know from minute to minute what the parameters of the unstated period of time were and, thus, could not adequately defend appellant.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED EVIDENCE OF ALLEGED PRIOR BAD ACTS OF APPELLANT

As previously stated, over defense counsel's objection, the trial court allowed the introduction of bad acts evidence not relating to July 23, 1996 as charged by the information. A hearing should have been conducted prior to the introduction of the incriminating evidence to determine its admissibility. The wrongful admission of prior uncharged conduct evidence was a critical error denying

appellant a fair trial. The Court's ruling severely prejudiced appellant by awarding the People with the advantage of essentially cruel treatment evidence which characterized Mrs. Eimers' as a person with a propensity to be cruel and abusive to animals.

It is horn book that "... evidence of a defendant's prior criminal or immoral conduct is inadmissible if it cannot logically be linked to some specific material issue in the case." People v. Hudy, 73 N.Y.2d 40, 54, 538 N.Y.S.2d 197, 205 (1988) [citations omitted]. Prior uncharged criminal or immoral conduct:

> ... is usually excluded because it may (1) require defendant to meet a charge of which he had no notice; (2) raise collateral issues and direct the attention of the jury away from the crime charged; or (3) result in the proof of prior offenses being taken by the jury as justifying a condemnation of the defendant irrespective of his guilt of the offenses charged.

[Citations omitted]. People v. Lewis, 69 N.Y.2d 321, 325, 514 N.Y.S.2d 205, 207 (1987); see also, People v. Molineaux, 168 N.Y. 264, 313, 61 N.E. 286 (1901). If the only purpose of the proposed evidence is to demonstrate defendant's bad character or propensity to engage in criminal conduct, it may not be admitted. People v. Alvino, 71 N.Y.2d 233, 241, 525 N.Y.S.2d 7, 11 (1987). However, evidence of prior uncharged crimes may be admissible if it helps to establish an element of a crime under consideration at trial. Id; see also, People v. Roides, 124 A.D.2d 967, 508 N.Y.S.2d 826, 827 (4th Dept. 1986).

Whether to admit uncharged crime evidence is determined by a two step process. People v. Hudy, supra, at 55, 538 N.Y.S.2d at 206. First, the trial court must determine whether the proponent

of such evidence has demonstrated that it is relevant to a material issue in the case. Id; see also, People v. Allweiss, 48 N.Y.2d 40, 46-47, 421 N.Y.S.2d 341, 344 (1979). This is a question of law, not discretion. People v. Alvino, supra at 242, 525 N.Y.S.2d at 11. Second, "...even when admissible for such purposes, the evidence may not be received unless its probative value exceeds the potential for prejudice resulting to the defendant." People v. Kocyla, 167 A.D.2d 938, 939, 562 N.Y.S.2d 294, 296 (4th Dept. 1990); see also, People v. Ely, 68 N.Y.2d 520, 529, 510 N.Y.S.2d 532, 538 (1986). This weighing process is discretionary in nature. People v. Hudy, supra. Obviously, the prior bad act evidence submitted by the People was not demonstrative of a relevant material issue in the case.

The Court of Appeals in People v. Ventimiglia, 52 N.Y.2d 350, 488 N.Y.S.2d 261 (1981), advised that a prosecutor intending to offer prior bad act evidence should seek a preliminary ruling on the admissibility out of the presence of the jury, either "prior to trial, just before the trial begins or just before the witness testifies." 52 N.Y.2d at 362. At this point "the evidence to be produced can be detailed to the Court, either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness," thus giving the trial judge a better opportunity to "assess how the evidence came into the case and the relevance and probativeness of, and necessity for it against its prejudicial effect, and either admit or exclude it in total, or admit it without prejudicial parts when that can be done without distortion of its meaning." 52 N.Y.2d at 362. See also, People v. Matthews, 68 N.Y.2d 118, 122, 506 N.Y.S.2d 149 (1986). The courts have enforced Ventimiglia without hesitation. See, People v. Burke, 170 A.D.2d 1021, 566 N.Y.S.2d 169 (4th Dept. 1991), lv.den., 77 N.Y.2d 959 ("prosecutor's failure to request, and the Court's failure to conduct, a Ventimiglia hearing... was patently improper").

Specifically, the Court of Appeals in People v. Ventimiglia, stated:

> When a prosecutor, knowing that such evidence is to be presented, waits until objection is made, when it is offered during trial before informing the Court of the basis upon which he considers it to be admissible, there is unfairness to the defendant, even if his objection is sustained, in view of the questionable effectiveness of cautionary instructions in removing prior crime evidence from consideration by the jurors. There is, moreover, a greater probability of error, and consequent waste of scarce judicial resources, when evidentiary ruling are made during trial than in the more relaxed atmosphere of an inquiry out of the presence of the jury.

52 N.Y.2d at 361, 438 N.Y.S.2d at 265.

Here, the prosecution failed to request a preliminary ruling pursuant to Ventimiglia to determine the admissibility of prior bad acts that were put before the jury on numerous occasions. For example, over defense counsel's objection, Paul Switzer testified to both specific and general conditions of Mrs. Eimers' kennels over the last couple of years (182-191). Specifically, he testified to the fact that the dogs were barking in the past couple of years both day and night (182-191). Obviously, this prior misconduct evidence did not pertain to the charges alleged in the Information. On another occasion, Ruth Ann Moscato was able to testify to generally muddy and odorous conditions of Mrs. Eimers kennel without drawing reference to July 23, 1996. Again, Michiah Wojcinski testified as to the unfortunate conditions of a chihuahua and a poodle a week before the charged incident giving rise to the impression that these

physical problems had existed for some period of time and that Mrs. Eimers was aware of the situation, but did nothing to rectify it.

The People were required to prove that these instances of alleged prior misconduct were admissible under Molineaux and that their probative value exceeded their prejudicial effect. Not only did the People fail to come forward with such proof, but the evidence adduced clearly went to Mrs. Eimers' propensity to run a bad kennel based on the witnesses' prior experiences. Further, whatever probative value the disputed testimony might have had, its prejudicial effect was overwhelming. The jurors were exposed to testimony of conditions extant only occasionally over a number of years, but was left with the impression of a generally unhealthy facility -- even though the only issue before them involved the specific conditions on the date charged. Thus, the trial court erred as a matter of law in allowing such evidence and, therefore, appellant's conviction should be reversed.

When evidence of prior bad acts is received, the jury must be instructed as to the limited purpose for which the proof was admitted. People v. Ricchiuti, 93 A.D.2d 842, 845, 461 N.Y.S.2d 67, 71 (2d Dept. 1983). Limiting instructions should be given both when the evidence comes in and during the charge to the jury. People v. Celestino, 201 A.D.2d 91, 96, 615 N.Y.S.2d 346, 349 (1st Dept. 1994). Here, the lower court never advised the jury that the prior bad acts introduced did not constitute proof that appellant possessed a propensity to commit the crimes charged. The Court did, however, make a feeble effort in an attempt to strike certain evidence from the record (182). With regard to Mr. Switzer's recollection of what had happened within the last couple of years at the Eimers' kennel the Court stated "let's see what he says about the last couple of years, then we can strike it." (182). The Court then

allowed the testimony and then stated "strike that from your minds." (183).

Unfortunately, the trial court's cautionary instruction with respect to Switzer's testimony did not alleviate the prejudice suffered by appellant. The Court did not address this issue in its final charge and did not explain how the jury was to evaluate this prior misconduct proof with respect to the element of abusing animals. Thus, the jury was left without guidance as to the proper method of evaluating proof of prior bad acts which should not have been before it anyway. This omission rendered the previously stricken testimony impotent, leaving the jury with the warning not to consider the prior acts, but allowing them to consider the proof as they saw fit with respect to violation of §353.

In the absence of specific final instructions detailing the purposes for which this proof could be considered with respect to a violation of §353, a real danger exists that the jury may have evaluated the prior uncharged crimes evidence improperly.

Therefore, the Court's minimal efforts to instruct the jury as to the limited purpose of such proof did not alleviate the prejudice suffered by appellant as a result of the improper admission of this uncharged conduct testimony.

In a case which such thin evidence, an error of this magnitude cannot be considered harmless. Accordingly, appellant respectfully requests that this Court reverse her conviction and grant her a new trial.

POINT IV

THE PEOPLE UTTERLY FAILED TO MEET ITS OBLIGATION UNDER C.P.L. §30.30

As the Court is aware, the arrest of the appellant occurred on July 31, 1996, wherein she was charged with cruelty to animals in violation of §353 of the New York State Agriculture and Markets Law. Defense counsel was retained on July 31, 1996 and he subsequently made his first appearance on August 6, 1996. On August 13, 1996 defense counsel made a motion to suppress all evidence seized pursuant to the search warrant. The Court granted the motion to suppress on August 16, 1996 in open court and with no opposition from the People, who thereafter asked the Court to dismiss the initial charge without prejudice. The prosecution then filed new charges against the appellant, and she was arraigned on September 17, 1996 wherein she entered a plea of not guilty.

As previously stated in defense counsel's affidavit in support of a motion to dismiss under C.P.L. §30.30, the time limitation under C.P.L. §30.30 relates back to the filing of the first accusatory instrument and is ascertained from that date. (See, People v. Sinistaj, 67 N.Y.2d 236, 501 N.Y.S.2d 793 (1986), and People v. Lomax, 50 N.Y.2d 351, 428 N.Y.S.2d 937 (1980)). (Affidavit 3). The initial information against the appellant was filed on July 31, 1996. The following delays were chargeable to the People: (1) July 31, 1996 to September 16, 1996 (48 days); (2) September 16, 1996 to October 21, 1996 (34 days); and (3) December 2, 1996 to April 24, 1997 (143 days) (65).

Therefore, a total of 226 days elapsed during which the District Attorney had failed to do anything to advance the case to trial (66). Obviously, these delays greatly exceed the ninety day

limit provided by C.P.L. §30.30(1)(b) for a misdemeanor punishable by a sentence of imprisonment of more than three months. (Affidavit 4).

In the case of People v. Kendzia, 64 N.Y.2d 331, 486 N.Y.S.2d 888 (1985), the Court stated that "ready for trial" in C.P.L. §30.30(1) encompasses two necessary elements:

> First, there must be a communication of readiness by the People which appears on the trial court's record. This requires either a statement of readiness by the prosecutor in open court, transcribed by a stenographer, or recorded by the Clerk, or written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk, to be placed in the original record (citation omitted). As the prosecutor must make an affirmative representation of readiness (See, People v. Santiago, 96 A.D.2d 720, 465 N.Y.S.2d 364), he may not simply rely on the case being placed on a trial calendar.

N.Y.2d at 337, 486 N.Y.S.2d at 890.

That the District Attorney's Office may have forwarded to the appellant a "statement of readiness" dated September 16, 1996 -- one day before the appellant was even arraigned -- is irrelevant. At that time, the defendant had no been arraigned and the Court on which did not have jurisdiction over appellant. C.P.L §1.20; People v. Grant, 16 N.Y.2d 722, 723, 262 N.Y.S.2d 106, 107 (1965) ["[T]he trial court had jurisdiction of the offense charged and acquired jurisdiction of defendant's person by the filing of an information and an appearance by defendant" (emphasis added)]. Consequently, there was no case to declare readiness. Moreover,

it has been held that where the People's announcement of their readiness for trial prior to the arraignment on the charges, is ineffectual. People v. Leavy, 204 A.D.2d 898, 612 N.Y.S.2d 488 (3d Dept. 1994), citing People v. England, 195 A.D.2d 751, 752, 600 N.Y.S.2d 320, lv. denied, 82 N.Y.2d 753, 603 N.Y.S.2d 995; People v. Battaglia, 187 A.D.2d 808, 810, 589 N.Y.S.2d 694 (3rd Dept. 1992).

Second, and most notably, the district attorney never gave notice of readiness to defense counsel despite his numerous appearances. In that respect, prosecutors are held to strict compliance with respect to legally mandated notices. See, People v. Zhu, 654 N.Y.S.2d 272 (Kings Cty. 1997), rev'd on other grounds, 1997 N.Y.APP.DIV.LEXIS 12090.

Obviously, the People have failed to meet the requirements of C.P.L. §30.30(1) by not notifying defense counsel that it was "ready for trial". Specifically, during the People's argument during the course of the §30.30 motion on April 15, 1997, it was the People's contention that they did not have to issue a statement of readiness to defense counsel because as a point of law, when the case was dismissed, Mr. Brautigam did not have at that time any standing as the attorney (84). Further, the People argued that when the charges were refiled, they filed with the appellant directly and the Court on September 16th a statement of readiness which was well within the mandated ninety days (84). This argument is specious.

Obviously, the People were well aware that Mr. Brautigam was defense counsel in this case. The People's argument is nonsensical when it specifically engaged in correspondence with Mr. Brautigam, received a motion from him and had appeared in Court with Mr. Brautigam personally.

As previously stated, on September 6, 1996, by their own motion, the People moved to dismiss the charges against the appellant. Only ten days later new charges were re-filed against the appellant on September 16, 1996. Obviously, the People had both constructive and actual knowledge that Mr. Brautigam was defense counsel with regard to this matter. Moreover, it was upon the People's motion that the first information was dismissed without prejudice. Obviously, this enabled the People to re-file charges against the appellant, and they did ten days later. To argue that they were unaware that Mr. Brautigam was defense counsel was preposterous.

Further, contrary to the People's representations below, there is nothing the prosecution can do, short of requesting disqualification of counsel, to terminate the attorney-client relationship. for the purposes of this case and its particular charges, the People had no reason to believe that the attorney-client relationship between counsel and Mrs. Eimers had been discontinued. Until they were made aware otherwise, the People should have notified defense counsel of their readiness as required in Kendzia.

The People's attempt to avoid compliance with the mandate of Kendzia is clearly insufficient. The District Attorney utterly failed to meet its obligation under C.P.L. §30.30 and this Court should dismiss the charges against the appellant where the People failed to file their "statement of readiness" with defense counsel and thereafter failed to state readiness on the record.

POINT V

THE INFORMATIONS CHARGING APPELLANT WERE DEFECTIVE WITHIN THE MEANING OF C.P.L. §170.35(1)(a)

The appellant moved for an order pursuant to Criminal Procedure Law §170.35(1)(a) dismissing the information on the ground that the accusatory instrument was defective within the meaning of C.P.L. §170.35(1)(a), in that they failed to allege an offense pursuant to the legal requirements set forth in C.P.L. §100.40(1)(c), and expressly upheld by the Court of Appeals in People v. Alejandro, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987).[3]

A valid and sufficient Information is a non-waivable jurisdictional pre-requisite to a criminal prosecution. See, People v. Alejandro, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987); People v. Hall, 48 N.Y.2d 972, 425 N.Y.S.2d 56 (1979); and People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977).

C.P.L. §140.40(1) sets forth the express conditions which must be met by an Information. The absence of one or more condition renders the Information fatally defective. First, the entire Information must conform to the requirements of C.P.L. §100.15 which prescribes the form and content for Informations and Complaints. Next, the factual part of the Information must meet two condition: (1) the allegations set forth in the Information must

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[3] Obviously this motion was denied. Counsel for appellant made a concerted effort to locate the Judges ruling pertaining to the denial of appellants motion. Neither this Court nor the Town of Pomfret Court were aware of any such written ruling or transcription.

provide reasonable cause to believe that defendant committed the offense; and (2) non-hearsay allegations must establish, if true, every element of the offense charged. People v. Alejandro, supra.

The Alejandro Court specifically noted that:

> "The factual part of such instrument must contain a statement of the complaint alleging facts of an evidentiary character supporting or tending to support the charges." C.P.L. §100.15(3).

Id. at 930 (emphasis added).

The Alejandro Court further noted that important purpose behind the strict requirements for the contents of an Information:

> The reason for requiring the additional showing of a prima facie case for an Information lies in a unique function that an Information serves under the statutory scheme established by the Criminal Procedure Law. An Information is often the instrument upon which the defendant is prosecuted for a misdemeanor or a petty offense. Unlike a felony complain (C.P.L. §180.10), it is not followed by a preliminary hearing in a grand jury proceeding. Thus, the People need not, at any time prior to trial, present actual evidence demonstrating a prima facie case, as with an indictment following a felony complaint.
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> ***
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> That it was the distinguishing characteristic of an Information -- its use as the sole instrument upon which the defendant could be prosecuted -- which

> prompted the legislature to write in the special restrictions applicable to Informations found in C.P.L. §100.40(1)(c) and §100.15(3) is confirmed by the legislative history leading to the enactment of these sections as part of the Criminal Procedure Law... [A]n "Information" (charging a misdemeanor or a petty offense) must demonstrate both "reasonable cause" and a "legally sufficient" or prima facie case -- a much more demanding standard [than that necessary for a felony complaint].

Id. at 930. The Court thus concluded that the showing of a prima facie case through non-hearsay allegations of an evidentiary nature alleging every element of the offense is a non-waivable jurisdictional pre-requisite. Id. at 931.

Specifically, defense counsel argued that the Information did not substantially conform to the form and content requirements prescribed in C.P.L. §100.15(3) as required by C.P.L. §100.40(1)(a) and the requirements as the sufficiency of the instruments on their face prescribed in C.P.L. §100.40(1)(b) and (c). The factual parts of the Information together with the single supporting deposition did not provide reasonable cause to believe that appellant committed the offense charged, nor establish every element of the offense charged.

Simply stated, the instant Information failed to allege, through non-hearsay factual allegations, a violation of §353 of the Agriculture and Markets Law. As previously stated, §353 states, in pertinent part, that:

> §353. Overdriving, torturing and injuring animals; failure to provide proper sustenance.
>
> A person who overdrives, overloads, tortures, or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor....

Agric. & Mkts. §353 (1997).

The rules of construction provide that "it is reasonable to assume that it is the design of the legislature to punish as criminal offenses only those acts which are intentionally committed" (emphasis added) [N.Y. Statues §274 (McKinney 1971) (citing People v. Fanchawe, 19 N.Y.S. 865 (1982) aff'd 137 N.Y. 68, 32 N.E. 1102, and Martin v. Goldstein, 20 App.Div. 203, 46 N.Y.S. 961 (892)].

The information charging Mrs. Eimers with violating §353 does not meet the requirements of C.P.L. §100.40(1)(b) or (c). The language of §353 cannot be construed to include conditions such as overcrowding or unsanitary conditions. Appellant was accused of being "negligently cruel," but the Information and deposition do not

indicate that at any time Mrs. Eimers acted in a manner that could be considered unlawful as defined in §353.

The Information must charge the offense in plain, concise, intelligible language stating facts without conclusions or evidence. It must describe or identify the acts or facts constituting the offense, with accuracy, exactness and precision. See, People v. Schildhaus, 10 Misc.2d 641, 642, 173 N.Y.S.2d 115 (1958) citing People v. Zambounis, 251 N.Y. 94 (1929). Once again, when the information fails to state facts sufficient to constitute the crime charged, it is jurisdictionally defective and must be dismissed. See, People v. Alejandro, supra. Deposition provided by Ms. Loffland from the AKC organization provides a conclusive opinion: the dogs were being deprived of "wholesome air, shelter and water," [deposition p.3]; as well as a conclusive feeling: "I feel Mrs. Wendy Eimers did not provide the essential care needed for basic medical treatment of the animals" [deposition p. 3]. As defense counsel argued below the deposition is not an addendum to an Information.

The Courts have said, "a supporting deposition is an indispensable part of an accusatory instrument, changing it from a misdemeanor complain upon which defendant may not ordinarily be prosecuted into information upon which defendant may be prosecuted. See, People v. Redding, 109 Misc.2d 487, 491, 249 N.Y.S.2d 204 (1981). Not only are the factual allegations in the Information and the deposition insufficient to validate the misdemeanor complain in this instance, but the conclusive opinion and feeling of deponent had no role validating the complaint.

Essentially, appellant was charged with violating a penal statute, and tried for violations that were construed from circumstances that were not illegal; and she was tried for an act that is not clearly described or forbidden.

Therefore, pursuant to Alejandro, supra, it follows that the instant Information clearly failed to allege, through non-hearsay factual allegations, the necessary elements of the crime charged, and should therefore be dismissed. People v. Alejandro, supra. Moreover, once again, the Information charged, "approximately one hundred thirty-two dogs were kept in over-crowded and unsanitary conditions with little or no shelter for each animal." It is appellant's contention that respect to this one count Information, the People were required to present proof with respect to one hundred thirty-two dogs.

Additionally, it is essential to a defendant's ability to make a defense and to plea the judgment in bar of any further prosecution that she not be called upon to answer for more than one offense in each count of an Information. Indeed, the C.P.L. requires not only that each count specify a time when or during which the crime was committed, but also specifically demands that each count of an indictment charge only one offense (C.P.L. §200.30[1]; 200.50[3]; see also, People v. Klipfel, 160 N.Y.371, 374, 54 N.E. 788). Hence, where a crime is made out by the commission of one act, that act must be the only offense alleged in the count. Put differently, acts which separately and individually make out distinct crimes, must be charged in separate and distinct counts. See, People v. MacAfee, 76 A.D.2d 157, 431 N.Y.S.2d 149.

Essentially, because appellant was alleged to have mis-treated 132 dogs, there is no reliability in the fact that there existed a unanimous verdict. Arguably, because there was more than one offense alleged in one count, (possibly, one hundred thirty-two offenses) individual jurors might have voted to convict the appellant of that count on the basis of different offenses; the appellant would thus stand convicted under the count even though the jury may have never reached a unanimous verdict as to any one

of the dogs. (See, People v. MacAfee, 76 A.D.2d 157, 159-160, 431 N.Y.S.2d 149, supra).

Because the People did not have to put forth evidence of abuse to one particular dog, appellant is unaware of what she was convicted for. Was she convicted of (1) dachshunds fighting aggressively; (2) several dogs in pens with several days of fecal matter; (3) the ground pens housing St. Bernards with fecal matter of one inch in diameter and three inches high; (4) dogs running through fecal matter; (5) cockerspaniels and border collies with matted coats; (6) dogs with flies landing on their bodies; (7) some dogs with open sores on their ears and noses; (8) a golden retriever with a sore on its nose; (9) the smell of urine/ammonia coming from the whelping room; (10) some cages with dirty bedding; or (11) in the opinion of the inspector the dogs were deprived of wholesome air, shelter and water.

Moreover, the court's charge to the jury exacerbated this problem by providing two legal theories upon which the jury could convict appellant: (1) failing to provide proper food and sustenance; and (2) wilfully furthering an act of cruelty by causing pain, suffering or death to animals at her residence (340-41). The Court's failure to charge that the jurors' vote must be unanimous as to the theory underlying the conviction not only deprived appellant of a fair trial, but also made it even more difficult to determine the conduct upon which the jury rendered its verdict against Mrs. Eimers.

Thus, based on the foregoing, the Information must be dismissed. People v. Alejandro, supra.

POINT VI

APPELLANT WAS SEVERELY PREJUDICED BY THE ADMISSION OF AKC STANDARDS WHERE SHE WAS NOT CHARGED WITH VIOLATING THOSE STANDARDS

In the course of the trial, the Judge allowed that introduction of AKC standards from Holly Loffland, an inspector for the American Kennel Club. As the Court is well aware, appellant was charged with violating §353 of the Agriculture and Markets Law; she was not on trial for violating American Kennel Club standards. Thus, the introduction of these standards before the jury was prejudicial in that it most likely created confusion for the jury. There is a strong likelihood that the jury may have either (1) applied the wrong standard; or (2) presumed that because the defendant was found to have violated AKC standards she must have violated §353.

Agriculture and Markets Law §353 [overdriving, torturing and injuring animals; failure to provide proper sustenance], provides in relevant part, that:

> A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdrive, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any

> act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year or by a fine of not more than $1,000 or by both.

Agric. & Mkts. §353 (1991).

Specifically, Ms. Loffland was asked what an inspection for the AKC consisted of (209). She testified that the inspection consisted of checking for veracity of record keeping as required by AKC rules and regulations and all dogs registered by them (209). She is also guaranteed a viewing of those records (210). The inspection guarantees dog inspections on a dog identification (210). Ms. Loffland also stated that she has a right to inspect the kennel as part of the agreement with the American Kennel Club (212).

Obviously, the Court had allowed Ms. Loffland to testify to standards that pertain to AKC rules and regulations; regulations of which were totally irrelevant to the trial. Once again, appellant was charged with violating §353 of the Agriculture and Markets Law, not AKC standards. In that regard, defense counsel stated "she isn't allowed to make up standards. She's not allowed to make up a standard out of the air, and the standard, is it what the law is?" (223).

Most notably, over defense counsel's objection, the Court allowed Ms. Loffland to testify that had she had the power to sanction the appellant for violating AKC rules on July 23, 1996, she would have suspended privileges (227). Therefore, before the jury heard all of the evidence relevant to the charges they were informed that Mrs. Eimers had violated rules and regulations pertaining to the well-being of her animals.

It has long been held that instructions of the Court in a criminal case constituting theory upon which the case goes to the jury, are the law of the case and it is presumed that the conviction is based upon such theory. See, People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928). Moreover, in that regard, the judge's charge in a criminal prosecution constitutes the law of the case. See, People v. Lewis, 238 N.Y. 1, 143 N.E. 771 (1924).

Here, the Court charged the jury with the law on §353 of the Agriculture and Markets Law prior to deliberation (427). Therefore, the standards applicable to the AKC organization were clearly irrelevant and may have caused the jury to apply the wrong standard in their deliberations. Moreover, the jury could have concluded that because Ms. Loffland stated that she would have suspended privileges on July 23, 1996 had she the power under AKC rules and regulations, the jury may have determined that because she was in violation of AKC standards she must have violated §353 of the Agriculture and Markets Law.

Accordingly, because the jury had before it alleged violations of a non-legal standard, irrelevant to the charge of §353, appellant's conviction should be reversed where there was a strong likelihood of confusion among the trier of fact.

POINT VII

APPELLANT WAS PREJUDICED BY THE LATENESS OF THE HOUR OF JURY DELIBERATIONS

The late hour of deliberations with no inquiry by the judge as to either counsels' or the jury's ability to effectively proceed prejudiced the appellant. The trial conducted on Monday, May 19,

1997, commenced at approximately 3:30 p.m. The jury did not begin deliberations in this case until approximately 11:45 p.m. The jury returned its verdict at 1:20 a.m. in the morning on May 20, 1997.

Thus, the trial lasted approximately ten hours and the judge never inquired as to either counsel's or the jurors' ability to effectively continue on with their respective roles in the trial. As such, the appellant was prejudiced by the lateness of the hour in which deliberations occurred and a reversal of defendant's conviction is required.

The right to trial by jury in a criminal proceeding has long been established as the normal and preferable mode of disposing of issues of fact. A part of the credo of the American legal system, it is a fundamental imperative sacrosanct in nature and guaranteed by both Federal and State constitutions (see, U.S. Const., Art. III, Sec. 2; U.S. Const., Sixth Amend.; N.Y. Const., Art. I, Sec. 2).

With regard to the importance of jury trials in People v. Hurley, 86 Misc.2d 601, 383 N.Y.S.2d 177 (Onondaga Cty. Ct. 1976), the Court stated that in a criminal trial a jury by virtue of the very nature of the proceedings must consider all of the facts presented to it by both the People, and the appellant, and be further able to consider those facts determined upon, in the light of the charge given to it by the Court relative to the legal principles of law, and apply that law to the facts of the case before it, to ultimately determine the guilt or innocence of the appellant. (383 N.Y.S.2d at 180). The Court further stated:

> This Court is of the opinion that this task cannot properly be performed by a jury made up of people who have been awake the whole day of the trial and

> who must them remain awake throughout the evening and throughout the night until the early morning hours of the next day.

383 N.Y.S.2d at 180. Moreover, the Court stated:

> Additionally, it must be extremely difficult for the Judge, the prosecutor and the defense attorney to properly perform each of their several functions as the strain of hours build up. Most importantly, the witness to the event must be able to be mentally alert enough to be able to recall all the facts within their knowledge that bears on the defendant's guilt of innocence. This obligation most certainly is hindered by one whose mind has been dulled by the work of the day and the expectation that the following day's labor will have to be performed with little or no sleep.
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> This Court frequently asks jurors in trials before to draw on their everyday experiences when deciding issues presented to it, so must an Appellate Court in light of the record presented to it, and in so doing, this Court is of the opinion that the jurors in the instant case could not properly consider the guilt or innocence of this defendant after an all-night trial as disclosed in this records on appeal. The times involved in the instant case must certainly support the position of the defendant-appellant and his attorney's observation upon the oral argument of this appeal, wherein he indicated that jurors appeared quite tired to him during the early morning hours.

383 N.Y.S.2d at 180.

In conclusion, the Court stated that the public as well as the defendant is entitled to the assurance that there will be a fair trial, and when an Appellate Court concludes from the record before it that such was not possible that conviction cannot stand unimpeached. 383 N.Y.2d at 180.

With regard to night trials, in the case of People v. Passero, 78 Misc.2d 548, 357 N.Y.S.2d 677 (Monroe County Court, 1974), the Court stated that it is from the circumstances of each case whether a appellant has been afforded a fair trial. 357 N.Y.S.2d at 681. In that respect, the Court quoted from the Bar Association's brief:

> All the people involved; Judge, jury, attorneys and witnesses start anxiety that the case will not last until dawn, robbing them of rest before the morrow's work day. Hence, the trial judge must be on the alert and make sure either sua sponte or upon application of the other parties that a continuance is neither needed or necessary for the proper administration of justice. This he should do by making inquiries of counsel and the jury, as to their ability to carry on, the availability of all parties and witnesses at a future adjourned date, the number of witnesses yet to testify, the complexity of the case etc.

357 N.Y.S.2d at 681.

Here, the trial commenced at approximately 3:30 p.m. The summations and the charge to the jury were completed at 11:45 p.m. At some point the jury returned for further instructions,

resumed deliberations at 1:00 a.m. and returned with its verdict at 1:20 a.m. At no point did the trial judge inquire as to their ability to carry on, the availability of all parties and witnesses at a future adjourned date, or the ability of the attorneys to successfully advocate their positions. The inevitable and unfortunate consequence is that the appellant's right to trial by jury was extremely impaired. Thus, the judgment of conviction should be reversed and a new trial granted.

POINT VIII

APPELLANT'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND IS AGAINST THE WEIGHT OF THE EVIDENCE

Appellate review of legal sufficiency and weight of the evidence is inter-related, but the standards require discreet analysis. People v. Bleakley, 69 N.Y.2d 490, 495 (1987). Legal sufficiency review calls on the Court to determine whether the evidence, viewed in the light most favorable to the People, could lead a trier of fact to conclude that each of the elements of the crime have been proven beyond a reasonable doubt. People v. Wong, 81 N.Y.2d 600, 608 (1993); see also, People v. Hawkins-Rusch, 212 A.D.2d 961 (4th Dept. 1995).

Even if the reviewing court concludes that the evidence was legally sufficient, where a different verdict would not have been unreasonable, the Court must weigh "the probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony." People v. Bleakley, 69 N.Y.2d 490, 495 (1987), quoting People ex. rel. MacCracken v. Miller, 291 N.Y. 55, 62 (1943). The Appellate Court may set aside the verdict if it appears that the trier of fact

failed to give the evidence the weight it should have been accorded. People v. Bleakley, supra. Such relief is warranted in the instant case, where the verdict is not supported by legally sufficient evidence and is also against the weight of the evidence.

The Information charged Mrs. Eimers with one count of overdriving, injuring animals, and failing to provide proper sustenance arising out of an incidence which purportedly occurred on Wednesday, July 23, 1996 at her residence. During trial, a serious issue was raised regarding introduction of evidence not pertaining to the date charged on the Information. The result was that witnesses testified to events that were not illegal but taken cumulatively had an extremely prejudicial impact on appellant. Moreover, because the Information charged alleged misconduct with respect to one hundred thirty-two dogs, the jury could draw negative inferences from evidence pertaining to a lot of dogs, which taken by itself would not have warranted the charges.

As previously stated, §353 of the Agriculture and Markets Law states, in relevant part, that:

> A person who overdrives, overloads, tortures, or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any

> act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor....

Not only did the People fail to prove any one of these elements with respect to one hundred thirty-two dogs, they clearly did not establish a prima facie case of this crime for even one dog. The People did not present evidence that demonstrated that any dog was overdriven, tortured, injured or not fed properly. Simply put, the evidence presented amounted to dogs that barked, smelled, fought, and knocked their food and water dishes over.

More specifically, Ms. Loffland, the AKC inspector, testified to insignificant facts with regard to the crime charged: the dogs "appeared to be fighting" (214); "the dogs were right on the ground" (216); "cockerspaniels and border collies had severe matting" (218); "some of the pens had spilled food and fecal matter" (218); "one golden retriever had a very large sore on the tip of the nose" (219); and "some of the [water] buckets were either spilled or empty" (222).

Other witnesses for the People were neighbors of appellant. They merely testified that they could hear barking or smell the dogs from their homes; neither of which are elements of the crime charged.

Clearly, the trial proof was not sufficient to allow a trier of fact to conclude that any element of the crime of overdriving, torturing and injuring animals or of failure to provide proper sustenance had been proved beyond a reasonable doubt. People v. Wong, supra. The People's evidence proved only one thing with certainty, the obvious: dogs do fight and play, knock over their food dishes, bark and go to the bathroom when and wherever they desire. There was no proof that any of the dogs were malnourished

or that the conditions had lasted more than a day or two. Further, other than one dog with a sore on its nose, there was no proof of pain, suffering or death of any of the animals in Mrs. Eimers' care.

Further, the verdict was clearly against the weight of the evidence. People v. Bleakley, supra. Proper weighing of the evidence demands acquittal, particularly in the light of this insubstantial proof and the vast amount of improper evidence that was submitted before the trier of fact. Accordingly, appellant respectfully requests that this Court reverse her conviction and dismiss the Information.

CONCLUSION

Appellant requests that this Court reverse her conviction and dismiss the Information or, in the alternative, grant a new trial.

Dated: Buffalo, New York
January 23, 1998

Respectfully submitted,

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF CHAUTAUQUA

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner

vs.

WENDY J. EIMERS,

Respondent.

Respectfully submitted by:

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I. THE TRIAL COURT DID NOT ERR IN PRECLUDING THE TESTIMONY OF THE DISABLED WITNESS

For the Court to consider any testimony from a witness the testimony had to be relevant. In pre-trial comments in chambers, Mr. Brautigam, the defendant's trial attorney, expressed an interest in calling Janet Pulci as a defense witness. By Mr. Brautigam's own admissions, he states that "She is not in fact a witness to any event on July 23rd or any other date. She is not familiar with the condition of the kennels nor the home of the defendant." (Pages G099-0G100). Ms. Pulci is disabled and is a "patient" of Mrs. Eimers. (P.00099)

The People contend that any testimony given by Ms. Pulci would be irrelevant. By their defense attorney's own admission, Ms. Pulci has no knowledge of either the conditions existing in the kennels or care and conditions of the dogs in Mrs. Eimers' care. The extent of the relationship of Ms. Pulci and the defendant Mrs. Eimers was that of a nurse/patient and any testimony regarding that relationship would be irrelevant.

More importantly, the People requested that all witnesses, defense and People's, be excluded from the courtroom until called. Although the stenographer somehow omitted the request, evidence that the request was made can be demonstrated by the Pre-Trial discussions on pages 000095-000100. Judge Prince on page 00095 ordered "anyone that's going to be a witness other than you (Mrs. Eimers)... I don't want them in the courtroom." Thereafter, Mr. Brautigam attempted to divert the trial court's order by stating that, "the defendant is toying with the idea of calling Janet Pulci as a character witness. (Page 000999). The People believe that Mr. Brautigam knew all along of his intentions to call Ms. Pulci and was simply trying to gain an unfair advantage by employing this

approach. Ms. Pulci should have been excluded from the courtroom as the People requested.

The People further believe that Mr. Brautigam "toyed" with the idea of calling Ms. Pulci only to try to create an appealable issue when it became clear that the People would prevail. Mr. Brautigam, because of his proximity to the community, unlike appellant attorney, Mr. Wilcox, knew full well that Janet Pulci could not give character testimony regarding Mrs. Eimers.

"A character witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded." (*Solomon Michaelson v. U.S.*, 335 U.S. [469-496]). Unfortunately, Ms. Pulci suffers from advanced multiple sclerosis, a condition known by the trial judge, defense counsel and myself. She is confined to a wheelchair or a bed. She requires around the clock care and can only move her wheelchair by manipulating a breath control device. Her contacts with the general community are minimal at best, and she does not and could not have knowledge of the defendant's reputation in the community.

Further, the People contend that you can not equate the care and feeding of humans with that of the care and feeding of animals. One simply does not equate one with the other. To allow testimony of specific acts of kindness, done in the course of defendant's duties, and to equate that with a propensity to treat animals in a caring and nurturing way would have been highly prejudicial to the People's case and would have out-weighed any probative value associated with it.

In the case of *U.S. v. Wilson*, 750 F. 2d 7, the court ruled that, "It is a proper exercise of a district court's discretion to exclude evidence that is prejudicial, confusing or misleading and to exclude evidence of specific acts intended to demonstrate character traits not at issue." This is specifically what the trial court did. It excluded Mrs. Eimers' specific duties as a nurse because those duties were not at issue and testimony regarding those duties would confuse or mislead a jury.

Finally, if there was an error in impeding defendant's ability to present his own witnesses to establish a defense, the error was harmless.

II. THE TRIAL COURT DID NOT ERR BY ALLOWING EVIDENCE OF A CONTINUING CRIME

The Court when considering this appeal must be aware of the fact that the case against Wendy Eimers involves a violation of the Agriculture and Markets Act and not one involving a section of the Penal Law. The People do concede that the punishment for a violation of this statute is commensurate with that of a Penal Law misdemeanor, but the fact that the legislature specifically removed the cruelty statutes from the Penal Law in 1968 clearly demonstrates the Legislature's intent to differentiate a violation of the Agriculture and Market Sections from that of a violation of the criminal law.

A further differentiation from the Penal Law can be shown by the fact that a defendant convicted of the Agriculture and Markets Act §353 is not mugged, fingerprinted, or given a criminal record.

The leading case outlining the differences between the Agriculture and Market Law §353 and the Penal Law is *People v. Minton*, (647 N.Y.S. 2d 692). After delineating the legislative history on the animal cruelty statutes the Court ruled, "that it was

the intent of the Legislature to classify animal cruelty as a continuing crime." (647 N.Y.S. 2d 695).

> "Further, when a crime by nature as defined by the enacted statutes, may be committed by one act or by multiple acts it can reasonably be characterized as a continuing offense over time, the indictment or information may charge the continuing of offense is a single count... A defendant may be guilty of a crime by virtue of a series of acts, none of which may be enough by itself to constitute the offense, but each of which when combined makes out a crime." [citations omitted]

Therefore, based upon the holdings of *People v. Minton*, the Court did not err in applying a continuing crimes theory.

Further, the testimony received into evidence at trial did concern events on or about July 23,1996. Appellant's attorney concludes that Michael Wojcinski's testimony (133-148) relates to events one week prior to July 23rd. Mr. Wilcox's assumptions are wrong.

In chambers, Mr. Wojcinski was asked: (143)

> MR. COUGHLIN: Was it inside a week?
> THE WITNESS: Yes, it was around the week before.
> MR. COUGHLIN: Before what?
> THE WITNESS: Before she was prosecuted of the other charges.

What appellant's attorney fails to tell the Court is that the reference to a week was from the initial seizure of the dogs by the State Police on July 31, 1996. This becomes evident when defense counsel states, "Judge, the July 31st was the illegal seizure."

Therefore, a week before would clearly fall within the confines of on or about July 23, 1996.

Other testimony given by witness Ruth Ann Muscato and Mr. Paul Switzer were clearly prefaced with the time frame of on or about July 23, 1996. Any other testimony allowed into evidence was not either objected to or was disallowed by the Court as being outside the time frame of July 23, 1996.

Finally, the People contend that the judge's rulings were too restrictive and prejudicial to the People's case when scrutinized under the dictates of *People v. Morton*.

III. THE TRIAL COURT DID NOT ADMIT EVIDENCE OF ALLEGED PRIOR BAD ACTS

Specifically, appellant's attorney refers to the testimony of Mr. Paul Switzer (pgs. 000182-000191), Mrs. Ruth Ann Muscato and Mr. Michael Wojcinski in alleging that the trial court allowed evidence of prior bad acts, by the defendant. This allegation is simply not true.

It is true that Mr. Switzer offered testimony to the Court that "the last couple of years we have put up with a great deal of barking, night and day," but when Mr. Brautigam objected, the trial court sustained the objection and ordered the jury to "Strike that from your minds." (Page 000183)

The other testimony cited in appellant's brief the testimony of Mrs. Muscato and Mr. Wojcinski, are not prior bad acts, but would fall under the continuing crimes theory discussed at length in respondent's answer Number II. Any other allegations of the use of prior bad acts would either fall under the continuing crime theory of prosecution or would be harmless error.

IV. THE PEOPLE DID MEET THEIR SPECIAL TRIAL OBLIGATIONS UNDER CPL 30.30

Mrs. Eimers was originally arraigned on one count of Cruelty to Animals on July 31, 1996. Those charges came from the seizure of her animals on that date, brought about by a search warrant issued by Judge David Prince on August 13, 1996. Mr. Brautigam brought forth a motion moving to suppress the seized evidence. The matter was scheduled for argument an September 6, 1996. In the interim, a series of negotiations were held between Mr. Brautigam, the Chautauqua County Humane Society, the District Attorney's Office and the Eimers relating to a just disposal of the case. The District Attorney's Office sought dismissal of the charges in return for the Eimers giving up ownership of their animals. The Eimers would not accept the proposal unless they were compensated for their dogs. Negotiations from that point deteriorated rapidly. The Eimers were demanding monies in excess of $250.00 per dog. They, the Eimers, accused Mr. Brautigam of siding with the District Attorney because he recommended settling the case. Mr. Brautigam informed this District Attorney that he either would be fired or not represent them in the future because their relationship had deteriorated badly. Finally, on September 6, 1996, Judge Prince dismissed the case without prejudice and allowed the People ten (10) days to refile charges if they wished to.

Therefore, the People filed new charges in Town Court based upon different evidence relating to the July 23, 1996 date on September 16, 1996. Included in the new Information were the People's Statement of Readiness filed that same day. A copy was mailed to the Defendant on that afternoon. Mrs. Eimers then appeared without counsel to be arraigned on September 17, 1996. Mr. Brautigam was not notified because the People were unaware that he would still represent the defendant. That was based upon out of court discussions with Mr. Brautigam listed above. Further, the

People contend that once the case was dismissed, the lawyer client relationship terminated.

The People's Statement of Readiness filed September 16, 1996 was timely under CPL 30.30.

V. THE INFORMATIONS CHARGING THE APPELLANT WERE NOT DEFECTIVE WITHIN THE MEANING OF CPL 170.25(1)(A)

The Information, together with the supporting deposition, does conform to the form and content requirements prescribed in CPL §100.15(3) as required by CPL §100.40(1)(A) and the requirements as to the sufficiency of an instrument on its face prescribed by CPL §100.40(1)(b) and (c). The factual part of the Information, together with the supporting deposition, provided reasonable cause to believe that the defendant committed the offense charged.

Criminal Procedure Law §100.15(3) provides that the factual part must contain a statement by the complainant alleging facts of an evidentiary character to support the charges. The first Information alleges Mrs. Eimers was (1) "cruel to the dogs at her residence; and, (2) that the "dogs were kept in overcrowded and unsanitary conditions with little or no shelter for each animal."

"Torture" or "cruelty" as defined in §350 of the Agriculture and Markets Law includes every act, omission, or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted. The deposition of Ms. Holly Loffland enumerates the acts of omission or neglect by Mrs. Eimers that resulted in unjustifiable physical pain, suffering or death to the animals under her care.

Briefly, those acts would include an overt act: overcrowding (a pen containing seven (7) Dachshunds in a three (3)

foot by six (6) foot suspended pen); neglect (pens containing several dogs with several days worth of fecal matter and matted coats); and, omission (failure to provide adequate medical care to open sores on dogs and insect infestation). These acts listed above do not encompass all the acts of cruelty listed in the deposition, but are sufficient to oppose a Motion to Dismiss for insufficiency.

The second fact alleged in the Information was that the "dogs were kept in overcrowded and unsanitary conditions with little or no shelter for each animal." The People submit that this amounts to an act of cruelty as defined in Agriculture and Market Law §350, but also amounts to a furtherance of any act of cruelty as defined in the latter section of 353.

Unsanitary "whelping rooms" with a high odor of urine, old food, old soiled newspapers, filthy bedding and fecal matter are specific acts that "further acts of cruelty" by Mrs. Eimers.

It is important to note that the People do not have to prove Mrs. Eimers guilt beyond a reasonable doubt in their responding papers or in their initial Informations, but only show that the accusatory instruments are, not defective and that the People are ready for trial. The People submit that based on the arguments listed above, the People have met the minimal burden required by the CPL to defend a Motion to Dismiss on the grounds that the accusatory instruments are defective.

VI. THE APPELLANT WAS NOT PREJUDICED BY THE ADMISSION OF THE AKC STANDARDS

The Judge did allow Ms. Loffland, a representative of the American Kennel Club, to testify as to why she was at the Eimers' residence. The testimony was allowed to show that Ms. Loffland was an invitee of the Eimers and that the Eimers had a one day notice of her arrival. Finally, Mr. Brautigam did not object to any

of Ms. Loffland's background testimony, therefore, this issue is not reviewable by the Court.

VII. THE TRIAL COURT DID NOT ERR WITH RESPECT TO THE LATE HOUR OF JURY DELIBERATIONS

The trial court did consult with the defendant, Mr. Brautigam and the District Attorney about proceeding with deliberations at 12:15 A.M. on May 20th. (See attached Affidavit of Judge David Prince). At that time, everyone indicated their desire to have the trial come to an end that evening.

VIII. APPELLANT'S CONVICTION IS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND IS NOT AGAINST THE WEIGHT OF EVIDENCE

The verdict is supported by sufficient evidence and is not against the weight of the evidence. (See, *People v. Bleakely*, 65 N.Y. 2d 490, 495). The People through their witnesses adequately proved that:

(A) The outdoor kennels housing the dogs had:
  (1) No roofing [000119, 000189, 000215-216];
  (2) Inadequate drainage [000218, 000239]; and,
  (3) Unsanitary conditions [000218,000221].

(B) The dogs received little or no medical care. [000133, 000147, 000162, 000165, 000219 and 000200].

(C) The dogs' coats were matted and smelled of urine and feces [000162, 000219].

(D) That the dogs were not exercised or groomed (000171, 000172, 000190) and the overall conditions of the animals were so poor that the neighbors could continually smell an "overwhelming stench of dog feces" (000121,

000168, 000194-188), and there was continuous sound of barking and whining day and night. (000124, 000268, 000170, 000188-189).

Cruelty, as defined in the Agricultural and Markets Law, includes every act, omission or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted. There is no doubt that tile jury applied this testimony to the law and found legally sufficient factual evidence to support a guilty verdict. Issues of credibility are to be determined by the jury, and that findings by the jury are to be given great weight and should not be disturbed unless clearly unsupported by the record. *People v. Johnson*, 58 A.D. 2d 662, 395 N.Y.S. 2d 524 (3rd Dept. 1977); *People v. Davis*, 204 A.D.D. 736, 612 N.Y.S. 2d 524 (2nd Dept, 1954).

Dated: December 3, 1998
Mayville, New York

Respectfully submitted,

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STATE OF NEW YORK
COUNTY COURT : COUNTY OF CHAUTAUQUA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff/Respondent,

vs.

WENDY J. EIMERS,

Defendant/Appellant.

Upon Conviction from Town of Pomfret Court

REPLY BRIEF FOR APPELLANT

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POINT I

THE TRIAL COURT ERRED BY PRECLUDING APPELLANT'S CHARACTER WITNESS ON THE BASIS OF THE WITNESS' PHYSICAL DISABILITY

The prosecution objected to Mrs. Eimers' introduction of Ms. Janet Pulci as a character witness solely on the basis of Ms. Pulci's physical disability. The trial court's decision to allow such discrimination on the part of the prosecutor was a violation of Mrs. Eimers' Sixth Amendment and Due Process rights and, therefore, her conviction must be overturned.

At trial, the prosecutor argued that the only reason defense counsel was introducing Ms. Pulci's testimony was to play on the jury's sympathy. In fact, the Assistant District Attorney specifically stated that Mrs. Eimers probably had another terminally ill patient who was not in a wheelchair and that he did not really care to have a sympathy vote for Mrs. Eimers [100, 385-86].[1] No other grounds for preclusion were raised by the People at trial.

The prosecutor's argument raises the question of whether Ms. Pulci would have been allowed to testify had she been able to walk on her own two feet. A brief review of the record shows that the only reason advanced by the People at trial for precluding Ms. Pulci's testimony was the fact that she is disabled. The preclusion of an individual on the basis of a physical disability from voluntarily testifying at a trial not only has no basis in the law, but is utterly reprehensible.

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[1] Numerical references are to the record on appeal.

Pursuant to CPL §60.20, any person may be a witness in a criminal proceeding unless the Court finds, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence. The statute does not bar any person from being a witness on the basis of a physical disability; the competency of a witness is not judged on the basis of the witness' ability to walk but on the witness' intelligence and capacity to justify the reception of his evidence. In the instant case, the exclusion of Ms. Pulci's testimony was not based on the sufficiency of her intelligence or competency, but rather on her physical disability, which is not a justifiable reason for exclusion.

Moreover, in response to appellant's brief, the People for the first time offer various reasons for the preclusion of Ms. Pulci's testimony, none of which have any basis in the record. For instance, the People now argue that since Ms. Pulci suffers from advanced Multiple Sclerosis and is confined to either a wheelchair or a bed, she does not have the requisite knowledge of the appellant's reputation in the community to be qualified as a character witness. The prosecutor further states that Ms. Pulci's condition was known to himself, trial counsel and the trial judge, and that they all knew at the time of trial that she would be unable to vouch for the good character of Mrs. Eimers in the community given that she was confined to a wheelchair. Besides the fact that there is absolutely no evidence in the record concerning the extent of knowledge, if any, of either the prosecutor, trial counsel or even the trial judge, there is also no evidence that Ms. Pulci was completely cut off from the community.

First, Ms. Pulci was obviously not so ill that it prevented her from attending the trial. That her ability to appear before the trial court was not impeded establishes that Ms. Pulci was not so incapacitated by her physical disability that she was entirely isolated

from the community. The People's arguments to that effect are conclusionary and with out any support in the record necessitating rejection of such prosecution claims for lack of a proper foundation, lack of preservation and lack of substantive merit.

Second, the prosecutor's failure to object on the basis of Ms. Pulci's purported lack of community contacts nor only renders the claim unpreserved, but also prevented the development of a proper record for review by this Court. Had a specific and timely objection been made, the parties would have had an opportunity to explore true extent of the impact of Ms. Pulci's physical disability on the state of her knowledge concerning appellant's reputation in the community. Such an exploration could have addressed important factors such as Ms. Pulci's ability to travel within the community as well as her ability to communicate with member of the community through visitation, use of the telephone, correspondence, e-mail, etc. - - aspects of community interaction not even considered by the People.

The People also argue that since Judge Prince ordered that all witnesses, except for Mrs. Eimers, be excluded from the courtroom during the trial and Ms. Pulci was allegedly in the courtroom during the trial, her testimony was properly excluded. At the outset, it is important to note that there is absolutely no evidence in the record concerning Ms. Pulci's presence in the courtroom during the trial. Moreover, even if it could be shown that she was in the courtroom during testimony, the issues is not preserved because the People failed to object to her alleged presence in the courtroom. A brief review of the record demonstrates the People's failure to object to Ms. Pulci's presence in the courtroom:

MR. BRAUTIGAM: . . . but the question is; does she need to be excluded from the Court if she is not a fact witness?

THE COURT: I don't personally feel she has to be removed unless you object, but if she is only giving character testimony, which is not pertaining to this specific case itself is immaterial.

(Whereupon, the Judge; ADA, Mr. Coughlin; defense attorney, Mr. Brautigam; and defendant, left chambers.)

[100].

The People had ample opportunity to object to Ms. Pulci's presence in the courtroom during trial, but chose not to do so. The should not now be heard to complain that she should have been excluded on that basis (cite with explanation re: People's failure to object renders argument unpreserved).

Ironically, the People's arguments that (1) Ms. Pulci's testimony was properly excluded since she may have been in the courtroom during the trial and (2) that Ms. Pulci did not qualify as an expert witness since her physical disability prevented her from having contact with the community are in direct contradiction with each other. Specifically, the prosecutor cannot argue that Ms. Pulci's testimony was properly excluded since she may have been

in the courtroom by her own volition, while also arguing that Ms. Pulci was an incompetent character witness because her disability so completely debilitated her that she was not actually part of the relevant community.

Defense counsel offered Ms. Pulci as a character witness who would testify to show appellant's good character and that it is unlikely that appellant committed the offense charged. See, People v. Aharonowicz, 71 N.Y.2d 678, 681, 529 N.Y.S.2d 736, 737 (1988) (per curiam); see also, People v. Bouton, 50 N.Y.2d 130, 138-139, 428 N.Y.S.2d 218, 222 (1980). Ms. Pulci's testimony was obviously relevant, as well as crucial, to appellant's ability to present a full and persuasive defense. As the Court of Appeals has underscored:

> It is well settled that in a criminal prosecution, the appellant may introduce evidence as to his own character for the purpose of raising an inference that he would not be likely to commit the offense charged. People v. VanGaasbeck, 189 N.Y. 408 [82 N.E. 718, 22 L.R.A., N.S., 650] . . . , Cancemi v. People, 16 N.Y. 501. (Richardson, Evidence [8th ed.], Section 154; 7 Wigmore, Evidence [3d ed.], Section 1981).

People v. McDowell, 9 N.Y.2d 12, 210 N.Y.S.2d 514 (1961). The Court further emphasized:

> Objections to the exclusion of character evidence cannot be taken lightly. "This Court has frequently stated that evidence of good character is a matter of substance; [sic] not a form, in criminal cases, it must be considered by the jury as bearing upon the issue of guilt, even when the evidence against the

> defendant may be convincing." People v. Colantone, 243 N.Y. 134, 136, 152 N.E. 700, 701; People v. O'Regan, 221 App.Div. 331, 223 N.Y.S. 339. Indeed, the value of such testimony has pointed up by our rules as to the effect of evidence of good character. People v. Trimarchi, 231 N.Y. 263, 131 N.E. 910; see also, People v. Johnson, 5 N.Y.2d 1000, 184 N.Y.S.2d 861.

Id. at 14, 210 N.Y.S.2d at 515. Thus, the relevance of Ms. Pulci's testimony is indisputable and the preclusion of said testimony was reversible error.

The People's complaint that the introduction of Ms. Pulci as a character witness would have been highly prejudicial to their case is specious. Certainly, any time a defendant puts on a defense it is likely that prejudice may be caused to the People's case. Such prejudice is irrelevant given that it is well established law that a defendant in a criminal prosecution may introduce evidence that his character is such as to render it improbable that he committed the crime of which he is accused. People v. Bouton, supra, citing People v. VanGaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907). The People's further contention that the trial court, in excluding Ms. Pulci's testimony, excluded only evidence of specific acts intended to demonstrate character traits not at issue is unpreserved and baseless. [385]. Defense counsel clearly explained on the record that Ms. Pulci was offered as a character witness who would testify only to Mrs. Eimers' reputation in the community and not to specific acts of appellant [385]. The disputed testimony was offered for a proper purpose and should not have been precluded.

a. Preclusion of Ms. Pulci's Testimony Violated her Right to Equal Protection of the Law and Appellant's Right to Present a Defense.

Appellant maintains that Ms. Pulci's constitutional right to equal protection of the laws has been violated, along with appellant's right to present a defense. At the outset, it is important to note that the People have utterly failed to address appellant's equal protection argument, an acknowledgement that the People can offer no adequate defense to their actions.

By precluding Ms. Pulci's testimony solely on the basis of a physical disability, the prosecutor and the trial court violated Ms. Pulci's constitutional right to equal protection by denying her the opportunity to voluntarily participate in the activities of government. 42 U.S.C. §12132 (the Americans With Disabilities Act). As noted above, the rule governing the competency of a witness is clearly laid out in CPL §60.20. The statute provides that any person may be a witness in a criminal proceeding unless the Court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence. In the instant case, Ms. Pulci was not excluded on any of the aforementioned standards, but solely because of her physical disability. Thus, Ms. Pulci was denied her constitutional right to voluntarily testify on Mrs. Eimers' behalf.

Moreover, it is indisputable that the laws of this land are to be applied equally to all individuals. Unfortunately, the prosecutor in the instant case persuaded the trial court that discriminating against a witness on the basis of her physical disability was somehow proper under the law where the purpose of the discrimination was merely to allow the prosecutor's concern that the jurors might sympathize with Ms. Pulci because of her disability.

Such reasoning is contrary to law and demeaning to those citizens with physical disabilities. At the core, such attitudes relegate the disabled to second class citizen status and promote the very isolation of the handicapped which the prosecutor on this appeal has attempted to exploit - - without foundation - - in order to show that Ms. Pulci was not a competent character witness. Arbitrary and unreasonable roadblocks to participation in the process of governance by the disabled are antithetical to important societal goals and ideals which have been advanced by federal and state legislation as well as by the judiciary.

The preclusion of Ms. Pulci's testimony merely because she was physically disabled violated both her right to equal protection of the law and appellant's right to present a defense of her choosing. Accordingly, appellant respectfully request that this Court reverse her conviction and grant a new trial.

The People are unable to refer to any evidence in the record that would suggest that Ms. Pulci was excluded fora ny other reason than her physical disability. Thus, appellant was not entitled to present Ms. Pulci as a witness which would permit Ms. Pulci to voluntarily participate in the activities of government as guaranteed by law. The preclusion of Ms. Pulci's testimony violated both appellant's and Ms. Pulci's constitutional rights requiring that this Court reverse appellant's conviction and order a new trial.

II

THE TRIAL COURT FURTHER ERRED BY APPLYING A CONTINUING CRIMES THEORY

Appellant was charged with a violation of §353 of the Agricultural and Markets Law. More specifically, the Information

charged that on or about the 23rd day of July 1996, at about 10:00 a.m. the defendant did unlawfully commit the misdemeanor of overdriving, injuring animals, and failing to provide proper sustenance. In support of this charge, the trial court improperly received prejudicial evidence concerning other uncharged events, sporadically ruling that the charge would be treated as a continuing crime. The introduction of these uncharged crimes without a hearing violated appellant's constitutional rights and as such appellant's conviction must be overturned.

Contrary to the People's representations, appellant does not contend that a violation of §353 of the Agricultural and Markets Law can never be charged in a single count as a continuing crime, but only that in the instant case the violation was not charged as a continuing crime. In their response, the People rely completely on People v. Minton, 170 Misc.2d 272, 647 N.Y.S.692 (N.Y. City Crim. Ct. 1996), clearly ignoring the fact that Minton is distinguishable. In Minton, the defendant was charged with a single count of violating Agricultural and Markets Law §353 between July 19, 1995 and November 19, 1995, unlike the instant case where appellant was charged with a single count of violating §353 of the Agricultural and Markets Law on or about July 23, 1996 at approximately 10:00 a.m. The prosecutor in Minton correctly charged the single count violation as a continuing crime by charging recurring acts within a four month time period. Additionally, based on the form of the accusatory instrument, the defendant in Minton was given notice that the matter was being prosecuted as a continuing crime and thus was able to prepare a defense accordingly. In the instant case, by only charging the appellant with a single count violation on a specific day at a specific time, the prosecutor failed to charge appellant with a continuing crime, thereby also failing to give appellant notice that the matter was to be prosecuted as a continuing crime.

Specifically, the evidence received at trial under the prosecutions continuing crime theory included testimony concerning a witness having heard hurt animals yelping in the kennels given without specification as to date or time; testimony concerning a witness' receipt from appellant of two dogs in questionable physical condition approximately a week before July 23, 1996; testimony from a witness concerning the condition of appellant's kennel over a two year period of time even though prior to the testimony the trial court stated that the testimony likely would subsequently have to be stricken (apparently receiving the evidence out of mere curiosity); testimony from a witness concerning unspecified dates when he had observed cages with no protection and days where the temperature was ninety and the dogs had no protective cover; and testimony from a witness that he had seen dogs get loose from their pens and that he never saw the dogs exercised [123-26, 138-48, 161-67, 169-72, 182-84, 188-91]. The accusatory instrument provided no notice of these allegations which were ultimately received at trial under the prosecution's last minute continuing crime theory. Thus, appellant was deprived of her opportunity to formulate a meaningful defense. See, People v. Morris, 61 N.Y.2d 290, 295, 473 N.Y.S.2d 769 (1984).

Further, there is no assurance that appellant was convicted of the crime charged rather than on the basis of these other allegations. Indeed, it is quite likely that these alleged prior bad acts were accepted by the jury so evidence of appellant's propensity to neglect animals in her care.

This was, in fact, an attempt by the prosecution to sneak in prior bad acts without going through the required Ventimiglia hearing. The evidence was offered solely to show a propensity on the part of appellant to run a bad kennel, essentially that if she was

cruel to animals in the past then it is likely that she was cruel to animals on July 23, 1996 at 10:00 a.m.

Since the prosecutor failed to charge any other alleged crime except that on the 23rd of July, 1996, any evidence of other crimes is inadmissible without obtaining a ruling from the court prior to its introduction. Because of the prejudicial effect that evidence of prior uncharged crimes can have, a hearing on its admissibility must be held before it is offered by the prosecution. People v. Ventimiglia, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981); see also, People v.Molineaux, 168 N.Y. 264 (1901). In the instant case, the prosecutor failed to obtain a ruling from the court prior to introducing uncharged crimes and as such, committed reversible error since the evidence was admitted. People v. Heath, 175 A.D.2d 562, 572 N.Y.S.2d 228 (4th Dept. 1991).

Appellant further maintains that the trial court did not instruct the jury as to the proper manner in which prior misconduct evidence was to be evaluated. See, People v. Ricchiuti, 93 A.D.2d 842, 845, 461 N.Y.S.2d 67, 71 (2d Dept. 1983). Consequently, the jury was confronted with highly prejudicial information about the operation of appellant's kennels and was given no direction on how to assess the significance of this information. Given the lack of a limiting construction, the jury may have evaluated the prior uncharged crimes evidence improperly.

Additionally, on a related matter, the information by its terms was duplicitous. The information charged appellant with being negligently cruel to 132 dogs in her possession which created a situation where, based on the trial testimony and the court's charge that cruelty to any animal would be sufficient for a conviction, the jury may have rendered a non-unanimous verdict based on each individual juror's own perception of a particular

animal having been abused, but without six jurors agreeing unanimously as to abuse of any one animal. Because the court failed to charge that the juror's verdict must be unanimous with respect to each underlying unlawful act, it is impossible to determine exactly which incident appellant was convicted of. Significantly, the People have not even tried to defend this deficiency in the charging instrument and, consequently, the verdict. Appellant submits that the People's decision not to address appellant's arguments in this regard is a recognition of the validity of appellant's challenge to the verdict in this case. Where even the prosecution can offer no defense to these arguments, reversal of appellant's conviction is certainly merited.

Appellant will rely on her principal brief for the remainder of the arguments and respectfully requests that this Court reverse her conviction and order a new trial.

DATED: January 22, 1999 Respectfully submitted,

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April 15, 1999

VIA UPS

Honorable Judith S. Kaye
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, NY 12207

Attn: Clerk of the Court

Re: People v. Wendy J. Eimers
Chautauqua County Index No. K1-1997-016735
Appellant's Request for Leave to Appeal

Dear Justice Kaye:

Please accept this letter as appellant Wendy Eimers' application for a certificate granting leave to appeal to the Court of Appeals pursuant to CPL §460.20. Enclosed for the Court's review are copies of appellant's main brief, the brief by the respondent, appellant's reply brief, the order and decision of the Chautauqua County Court entered March 17, 1999, and a copy of the Record on Appeal.

No prior application for the relief sought has been made to any Justice of the Appellate Division. The appellant seeks oral argument, since she believes that this case has great merit, and wishes to be able to persuade the Court by way of written application and oral presentation.

This request for leave to appeal presents numerous questions, including the following:

(1) The preclusion of testimony from a character witness on the basis of the witness' physical disability;

(2) The application of a continuing crimes theory, although the information had only charged one specific day;

(3) The admissibility of prior bad acts evidence for the purpose of proving a continuing crimes theory;

(4) The application of CPL §30.30 to a 226-day delay;

(5) The introduction of American Kennel Club standards to inflame the jury, even though appellant had not been charged with violating those standards;

(6) The legal sufficiency of the evidence in the instant case; and

(7) Whether an information is defective if it does not substantially conform to the form

> and content requirements proscribed in CPL §100.15(3), as required by CPL §100.40(1)(a), and the requirements as to the sufficiency of the charging instruments on their face, as proscribed in CPL §100.40(1)(b) and (c).

Appellant was arrested on July 31, 1996 and charged with cruelty to animals in violation of §353 of the Agriculture and Markets Law. On September 6, 1996 the People, on their own motion, dismissed the charges against the defendant without prejudice and refiled new charges in the Town Court of Pomfret on September 16, 1996. Appellant was arraigned on the new charges on September 17, 1996 and entered a plea of not guilty.

On May 19, 1997, appellant was convicted after trial by jury in the Town of Pomfret Justice Court, County of Chautauqua, Honorable David A. Prince presiding, of one count of overdriving, injuring animals and failure to provide proper sustenance (Agriculture and Markets Law, §353). Appellant was sentenced on August 5, 1997 to three years' probation with the condition that she have no dogs or cats on her property during her probation term, one hundred hours of community service, a $90 special assessment fee and a $1,000 fine payable at the rate of $200 per month.

A timely appeal was taken on appellant's behalf to the Chautauqua County Court, which affirmed appellant's conviction on March 17, 1999.

The charges against defendant stem from the events of July 23, 1996. On July 22, 1996, Ms. Holly Loffland, from the American Kennel Club, telephoned Mrs. Eimers at her home to inform her that she would be coming to her house the next day to

review her records [119].[1] Although Mrs. Eimers was unaware that Ms. Loffland was going to do a walk-through of the kennels, she was more than accommodating when Ms. Loffland made her request [329]. During the walk-through of the kennels, Mrs. Eimers sought Ms. Loffland's expertise regarding some of her concerns with respect to the dogs [331, 342].

Ultimately, Ms. Loffland left the Eimers' residence without indicating to Mrs. Eimers that her premises were in violation of any regulations [251]. The first written statement Ms. Loffland issued to a law enforcement agency with regard to the condition of Mrs. Eimers' kennel was on September 13, 1996, approximately fifty-two days after her investigation of Mrs. Eimers' kennels [255].

Numerous critical errors occurred during Mrs. Eimers' trial, denying Mrs. Eimers her constitutional rights to due process and a fair trial. Appellant has given each of these errors a discrete subpart to assist the Court in its evaluation.

A. The Trial Court Erroneously Precluded Testimony from a Character Witness on the Basis of the Witness' Physical Disability.

At trial, defense counsel made it overwhelmingly clear to the Court and the Assistant District Attorney that he intended to call Ms. Janet Pulci as a character witness on behalf of appellant. Ms. Pulci has a crippling condition which has confined her to a wheelchair. Defense counsel specifically informed the Court and the Assistant District Attorney that he did not intend to interject anything about her physical condition [285, 385-86]. Specifically, Ms. Pulci would have testified that:

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[1] Numerical references are to the Record on Appeal.

> Mrs. Eimers had been her nurse for the last three years. She has nothing but the highest regard for Mrs. Eimers' abilities, and as far as she knows, Mrs. Eimers' reputation in the community is one of veracity and truthfulness and also that of kindness and sympathy to the injured and terminally ill [385].

The prosecutor objected to Mrs. Eimers' presentation of Ms. Janet Pulci as a character witness solely on the ground that the jury would be sympathetic to her because of her condition and the fact that she is confined to a wheelchair [285]. The trial court's decision to allow such discrimination on the part of the prosecutor was a violation of Mrs. Eimers' Sixth Amendment and Due Process rights, as well as a violation of Ms. Pulci's equal protection rights.

On appeal to the Chautauqua County Court, appellant maintained that the preclusion of Ms. Pulci's testimony was discriminatory and violative of Mrs. Eimers' constitutional rights. These claims were rejected by the Honorable John T. Ward, County Court Judge. Specifically, Judge Ward ruled that:

> The defendant desired to call a character witness who was confined to a wheelchair as a result of advanced multiple sclerosis. The defendant had been the witness' nurse for the three years prior to the trial. The defendant desired to call the witness to testify as to her reputation in the community for veracity and truthfulness and also for kindness and sympathy to the injured and terminally ill. . . . In most cases, the determination as to whether or not the probative value outweighs the prejudicial value of a character witness as well as the relevancy of the character trait in issue is best left to the sound

> discretion of the trial court. Here, the defendant's reputation for truthfulness and veracity do not relate to any trait involved in the crime charged. As for her reputation for kindness and sympathy for injured and terminally ill people, this Court cannot say that the trial court erred in determining that that reputation did not relate to any trait involved in caring for animals.

The Chautauqua County Court in determining this issues of law did not use arguments presented by the prosecutor at trial. Because the prosecutor improperly failed to render specific legal arguments on the theories underlying the appellate court's decision, a proper record with respect to these arguments was not made before the trial court. Appellant, therefore, submits that it was improper for the Chautauqua County Court to render a decision on the basis of legal arguments which appellant was not allowed to address at the time of trial.

With respect to the merits, as enunciated by this Court in People v. Aharonowicz, 71 N.Y.2d 678, 681, 529 N.Y.S.2d 736, 737 (1988) (*per curiam*), the rule has long been that in a criminal prosecution the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the offense charged. Id. at 681, 529 N.Y.S.2d at 737. In that respect, the evidence offered by the appellant must be probative of a character trait related to the crime charged. People v. VanGaasbeck, 189 N.Y. 408 at 414-416, 82 N.E. 718 at 719-720 (1907).

Additionally, it is axiomatic that defendant has a constitutional right to present a defense. People v. Hudy, 73 N.Y.2d 40, 538 N.Y.S.2d 187 (1988). In fact, it has long been recognized that when the Court denies the appellant his right to call a witness on his behalf, defendant's constitutional rights are

invaded. See, Chambers v. Mississippi, 410 U.S. 284, 294, 302, 93 S.Ct. 1038, 1045, 1049 (1973); People v. Foy, 32 N.Y.2d 473, 346 N.Y.S.2d 245 (1973); People v. Cuevas, 67 A.D.2d 219, 414 N.Y.S.2d 520 (1st Dept. 1979). Further, the Sixth Amendment to the United States Constitution and Article 1, Section 6 of the New York State Constitution guarantee to a criminal appellant the right of compulsory process to call witnesses in his favor. See, Ronson v. Commissioner of Corrections of the State of New York, 604 F.2d 176 (2d Cir. 1979). This right is applicable to the states under the Fourteenth Amendment and is implicated when an appellant is barred from calling witnesses to testify on his behalf, as in the instant case. See, Washington v. Texas, 388 U.S. 14, 19, 22, 87 S.Ct. 1920 (1967); see also, People v. Carter, 37 N.Y.S.2d 234, 239-240, 371 N.Y.S.2d 905, 910 (1975).

The right to present evidence by witnesses of one's own choosing is a fundamental ingredient of due process. People v. Gilliam, 37 N.Y.2d 722, 374 N.Y.S.2d 616 (1975), rev'g on the dissenting opinion of Justice Hopkins, 45 A.D.2d 744, 356 N.Y.S.2d 633. While an appellant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. See, Washington v. Texas, supra, 388 U.S. at 18-19, 87 S.Ct. 1920 (1967). Moreover, this Court has said that the testimony of a defendant's witness could not be prospectively excluded unless it is offered in palpably bad faith. People v. Gilliam, supra; People v. Daly, 98 A.D.2d 803, 804, 470 N.Y.S.2d 165 (2d Dept. 1983), aff'd, 64 N.Y.2d 970, 489 N.Y.S.2d 35 [trial court erred in excluding defendant's investigator's testimony].

This Court has also held that in a criminal prosecution the appellant may introduce evidence as to his own character for the purpose of raising an inference that he was not likely to commit the offense charged. People v. MacDowell, 9 N.Y.2d 12, 210

N.Y.S.2d 514 (1961) (citations omitted). In the same case, this Court held that objections to the exclusion of character evidence cannot be taken lightly. Id. at 14, 210 N.Y.S.2d at 515.

In the instant case, the People contended only that the defense intended to call Ms. Pulci for the benefit of manipulating the jury and playing on their sympathy in light of her disability [385]. The Assistant District Attorney specifically stated:

> One of the patients -- she probably has somebody terminally ill that's not in a wheelchair. It's all for sympathy. That's all it's meant to do, Your Honor [385]. . . . This is a terminally ill paraplegic to elicit sympathy [386].

The People's argument is not only without merit, it is also discriminatory. In the first instance, Ms. Pulci's proffered testimony was certainly relevant to character traits which were at issue during the trial. Mrs. Eimers was charged with neglect and maltreatment of animals in her care and her credibility was directly in issue. Ms. Pulci's testimony would have informed the jury of Mrs. Eimers' reputation for truthfulness and veracity and would have shown the jury that she is a compassionate and concerned individual [385].

The People chose only to focus on how their case could be disadvantaged if a disabled person was allowed to testify for the defense. Contrary to adhering to his duty to ensure justice is done, People v. Pelchat, 62 N.Y.2d 97, 106, 476 N.Y.S.2d 79 (1984), the prosecutor sought to preclude an important defense witness simply because she was in a wheelchair. Obviously, the prosecutor was not out to ensure that justice was done but only that appellant was prosecuted at all costs.

As discussed briefly above, at trial the People's sole objection to the admission of Ms. Pulci as a character witness was that she was in a wheelchair. No other grounds for preclusion were raised by the People at trial.

However, in response to appellant's brief to the Chautauqua County Court, the People for the first time offered various reasons for the preclusion of Ms. Pulci's testimony, none of which have any basis in the record. For instance, the People argued that since Ms. Pulci suffers from advanced multiple sclerosis and is confined to either a wheelchair or a bed at all times, she does not have the requisite knowledge of appellant's reputation in the community to be qualified as a character witness. The prosecutor further stated that Ms. Pulci's condition was known to himself, trial counsel and the trial judge, and that they all knew at the time of trial that she would be unable to vouch for the good character of Mrs. Eimers in the community given her physical confinement. Besides the fact that there is absolutely no evidence in the record concerning the extent of knowledge, if any, of either the prosecutor, trial counsel or even the trial judge, there is also no evidence that Ms. Pulci was completely cut off from the community. Significantly, Ms. Pulci was obviously not so cut off from the community that it prevented her from attending Mrs. Eimers' trial. Since Ms. Pulci's ability was not impeded, it is apparent that she was not so incapacitated by her physical disability that she was entirely isolated from the community. Additionally, the People's failure to object on the basis of Ms. Pulci's purported lack of community contacts not only renders the claim unpreserved but also prevented the development of a proper record for review. Had the People made a specific and timely objection, the parties would have had an opportunity to explore the true extent of the impact of Ms. Pulci's physical disability and the exact state of her knowledge concerning appellant's reputation in the community.

The People also argue post-trial that since the trial court had ordered all witnesses, except for Mrs. Eimers, to be excluded from the courtroom during the trial and Ms. Pulci was allegedly in the courtroom during the trial, her testimony was properly excluded. At the outset, it is important to note that there is absolutely no evidence in the record concerning Ms. Pulci's presence in the courtroom during the trial. Moreover, even if it could be shown that she was in the courtroom during testimony, the issue is not preserved because the People failed to object to her alleged presence in the courtroom. The relevant dialogue from the record regarding the People's failure to object is as follows:

MR. BRAUTIGAM: . . . But the question is; does she need to be excluded from the court if she is not a fact witness?

THE COURT: I don't personally feel she has to be removed unless you object, but if she is only giving character testimony, which does not pertain to the specific case itself, is immaterial.

(Whereupon, the Judge; ADA, Mr. Coughlin; defense attorney, Mr. Brautigam and defendant, left chambers) [100].

The People had ample opportunity at trial to formulate the aforementioned objections, but chose not to do so. They should not

now be heard to complain that Ms. Pulci should have been excluded on those basis. Furthermore, their failure to object renders these arguments unpreserved. Appellant's request to present her character witness should have been honored, especially in light of defense counsel's explanation that Ms. Pulci would testify to Mrs. Eimers' reputation as a truthful, caring, concerned person, traits which are obviously relevant to a charge regarding cruelty to animals. Moreover, Mrs. Eimers was under no duty to choose a character witness without a physical disability and who would be able to walk on their own two feet into the courtroom. Thus, appellant respectfully requests that this Court grant this leave application based on this violation of Mrs. Eimers' fundamental rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the corresponding New York State Bill of Rights Protections. Furthermore, the actions of the prosecutor and the Court violated the civil rights of the excluded witness. It is important to note that neither the People nor the County Court addressed appellant's argument that the preclusion of Ms. Pulci was a denial of her rights pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the New York State Constitution. The People's failure to counter appellant's arguments in this regard is especially telling. This failure on the part of the prosecution strongly suggests that the People could not formulate an adequate response to appellant's equal protection argument.

At the outset, it should be noted that appellant is entitled to assert Ms. Pulci's right to equal protection of the laws, since all the requirements of third-party standing have been met. First, appellant has a direct interest in achieving vindication of Ms. Pulci's equal protection rights -- reversal of her conviction and, ultimately, acquittal after presentation of her complete defense to the jury. See, People v. Kern, 149 A.D.2d 187, 545 N.Y.S.2d 4, aff'd, 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990); see also, People v. Gary

M., 138 Misc.2d 1081, 526 N.Y.S.2d 986 (Kings Co. 1988) [cited approvingly by this Court in People v. Kern, supra]. Second, obstacles exist to Ms. Pulci's ability to vindicate her own rights. See, NAACP v. Alabama, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170 (1958). The discrimination against Ms. Pulci occurred behind closed doors and outside of her presence. Further, Ms. Pulci was not a party to the litigation so she was without recourse to complain to the trial court. See also, People v. Kern, 149 A.D.2d at 234, 545 N.Y.S.2d 33. Finally, it is unlikely that anyone else will assert Ms. Pulci's constitutional interests. Id. Given that the State is the proponent of her exclusion from the judicial process on the basis of her physical disability, this would appear to be the only forum for vindication of her rights. In light of these circumstances, it is proper for appellant to seek vindication of the equal protection rights of Ms. Pulci and all others similarly situated.

By precluding Ms. Pulci's testimony solely on the basis of a physical disability, the prosecutor and the trial court violated Ms. Pulci's constitutional right to equal protection by denying her the opportunity to voluntarily participate in the activities of government. See, 42 U.S.C. §12132 (the Americans With Disabilities Act). The rule governing the competency of a witness is clearly laid out in CPL §60.20, providing that any person may be a witness in a criminal proceeding unless the Court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence. Here, Ms. Pulci was not excluded on any of the aforementioned standards, but solely on the basis of her physical disability. Therefore, both the prosecutor and the trial court denied Ms. Pulci equal protection of the laws.

In enacting the Americans With Disabilities Act, the Congress specifically sought to protect the civil rights of disabled citizens. Further, with the passage of the Equal Rights provision --

Section 40-C of the Civil Rights Law -- the Nw York State legislature admonished that all persons within the jurisdiction of the state were entitled to equal protection of the laws and specifically provided that:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in §292 of the Executive Law, be subjected to any discrimination in his civil rights or to any harassment, as defined in §24.25 of the Penal Law, in the exercise thereof, by any other person or by any firm, corporation or institution or by the State or any agency or subdivision of the State. Civil Rights Law §40-C(2) (emphasis added).

In the instant case, Ms. Pulci was denied her right to voluntarily testify on Mrs. Eimers' behalf solely on the basis of her status as a paraplegic. The action of the trial court, urged by a state prosecutor, deprived her of those civil rights accorded to her by law and denied her the guarantee of equal protection.

The demands of the State and Federal equal protection provisions, and sound public policy, mandate a reversal in this case. The analogy to Batson and its progeny is obvious. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). As this Court is well aware, in Batson the Supreme Court first ruled that exercise of peremptory challenges on the basis of race operated to deprive a criminal defendant of equal protection.

Further, the Batson Court recognized the broad detrimental effects of racial discrimination in jury selection, which extend beyond the injury to defendant himself:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try . . . by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Batson, supra at 87, 106 S.Ct. at 1718 (citations omitted).

In People v. Kern, supra, this Court acknowledged the truth of this Batson observation and, in extending Batson to bar racially-based exercise of peremptory challenges by the defense, also provided that a third party could assert a violation of the Equal Protection rights of a juror. People v. Kern, supra at 654, 555 N.Y.S.2d at 655-656; see also, People v. Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dept. 1990) [male defendant has standing to challenge gender discrimination against female jurors]. Further, the Kern ruling is consistent with the Supreme Court's decision in J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994) [gender-based exercise of peremptory challenges harms the litigants, the community and the individual jurors -- and violates the Equal Protection Clause]. The same rationale is applicable in the case at bar.

In the instant case, appellant intended to call Ms. Janet Pulci as a character witness on her behalf. Defense counsel explained to the Court and the Assistant District Attorney that Ms. Pulci was not going to testify to any specific acts but would testify solely to Mrs. Eimers' general reputation in the community as one of veracity and truthfulness and also that of kindness and sympathy [385-86]. Ms. Pulci has advanced multiple sclerosis and she is confined to a wheelchair which, unfortunately, the prosecutor used as a basis for his objection to her testimony. Further, the prosecutor not only objected to Ms. Pulci as a witness on an unlawful ground, but he

persuaded the trial court that discriminating against Ms. Pulci on the basis of her physical disability was somehow proper under the law.

B. The Trial Court Erred in Applying a Continuing Crimes Theory Causing a Severe Prejudice to Appellant.

The information in the instant case charged appellant with violation of §353 of the Agriculture and Markets Law. Specifically, the information stated that:

> . . . accuses Wendy J. Eimers, the above-mentioned defendant(s), with having committed the [misdemeanor] of overdriving, injuring animals, fail to provide proper sustenance in violation of §353, . . . of the Agriculture and Markets Law of the State of New York. On or about the 23rd day of July, 1996 at about 10:00 a.m. in the Town of Pomfret, County of Chautauqua, the defendant(s) did [intentionally], [knowingly], and unlawfully, commit the misdemeanor of overdriving, injuring animals, fail to provide proper sustenance (emphasis added).

The People clearly charged appellant in violation of §353 of the Agriculture and Market Law on a specific time and day, specifically "at about 10:00 a.m.," "on or about July 23, 1996." However, the Court allowed the introduction of incriminating evidence with respect to other occurrences and times not charged in the information. Under vehement protest by defense counsel, while ruling that the charge would be treated as a continuing crime, the trial court refused to rule in advance of proof as to the parameters of a designated period [85-86]. For example, Michiah Wojcinski was allowed to testify, over defense counsel's objection, to prior

bad acts which served to show a propensity for Mrs. Eimers to commit the crime charged on July 23, 1996. On direct examination, he testified in relation the conditions of to two dogs (a poodle and a chihuahua) that Mrs. Eimers had given to him as a gift [133-48] within a week of July 23, 1996 [143]. This evidence served to demonstrate that Mrs. Eimers had a propensity to commit the activity alleged in the information on or about July 23, 1996. Moreover, this evidence was extremely prejudicial to the appellant's defense structured around the specific date charged in the information -- July 23, 1996.

Further, the trial judge allowed Ruthanne Moscato to testify to general conditions of Mrs. Eimers' property without reference to July 23, 1996 [120]. The trial court permitted Mrs. Moscato to testify how she often heard yelping sounds coming from the kennels, as if some of the animals were hurt [170]. This testimony was not with regard to July 23, 1996. Instead, the testimony referred to the sound of yelping dogs without any temporal parameters provided for the testimony [170].

Similarly, Paul Switzer was allowed to testify over defense counsel's objection to both specific and general conditions of Mrs. Eimers' kennels over the prior couple of years [182]. Specifically, the trial court stated, "Let's see what he says about the last couple of years, then we can strike it" [183]. Defense counsel, Mr. Brautigam, objected to the Judge's statement that he would allow such testimony and then strike it. The trial court subsequently overruled the objection and allowed Mr. Switzer to testify to the fact that he has to put up with a great deal of barking, night and day [183]. Once again, Mr. Brautigam objected and the trial judge finally sustained the objection and informed the jurors, "You can't answer that. Strike that from your minds." Obviously, the damage was already done.

Interestingly, as the trial progressed, the trial court began to sustain Mr. Brautigam's objections to the introduction of evidence that did not pertain to July 23, 1996 [190]. For instance, Mr. Switzer testified that some cases had no protection, and that he had seen days when it was 90°, and days with absolutely nothing over the dogs. He had also seen dogs stand in the snow with no protection [190]. Here, the trial court sustained Mr. Brautigam's objection and stated, "Wait a minute, it only pertains to July 23rd. Any date -- Christ, I hope it doesn't snow on July 23rd" [190]. The trial judge then struck that from the record.

Paradoxically, within the next minute, the Judge ruled that the crime was a continuing act [191]. The Court was obviously inconsistent with its ruling as to whether the alleged violation should be treated as a continuing crime, occurring over a significant period of time, or whether it should be treated as charged -- "on or about July 23, 1996." In any event, the evidence the Court allowed before the jury which did not pertain to the alleged conduct on or about July 23, 1996 was extremely prejudicial to appellant.

Specificity in the information as to "the time and place and nature and circumstances of the offense" is important because it provides a defendant "with all reasonable knowledge and ability" and to have "full notice of the charge." Thus, enabling a defendant to formulate his defense. See, People v. Morris, 61 N.Y.2d 290, 295, 473 N.Y.S.2d 769 (1984) (citations omitted). Each count in a charging instrument must state, "that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time" (CPL §200.50[6]).

Moreover, when a defendant is charged with a crime that is perpetrated by commission of a single act and time is not a substantive element of the crime charged, the allegation of when the act was committed must be reasonably specific in light of all the

circumstances of the particular case. See, People v. Morris, 61 N.Y.S.2d 290, 295-296, 473 N.Y.S.2d 769 (1984); see also, People v. Keindl, 68 N.Y.2d 410, 419-420, 509 N.Y.S.2d 790 (1986). Significantly, when a crime may be committed by multiple acts over time and is amendable to characterization as a "continuing crime," the count in the charging instrument may properly allege that the single offense was committed over an extended significant period of time. People v. Keindl, 68 N.Y.2d at 421-422, 509 N.Y.S.2d 790; see also, People v. First Meridian Planning Corp., 86 N.Y.2d 608, 615-616, 635 N.Y.S.2d 144, 147-148 (1995).

A continuing crime is one "that by its nature may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time." People v. Keindl, supra at 421, 509 N.Y.S.2d 790. Whether or not multiple acts may be charged as a continuing crime is resolved by reference to the language in the penal statute to determine whether the statutory definition of the crime necessarily contemplates a single act. See, People v. Keindl, supra at 421-422, 509 N.Y.S.2d 795. The "continuing crime" theory allows prosecutors charged with the duty of prosecuting crimes composed of multiple acts to plead a designated period of time within which the acts are alleged to have occurred. People v. Keindl, supra. For example, a defendant may be guilty of a crime based on proof of a series of acts which, when viewed individually, may not constitute an offense, but taken together make out the crime. Id. Thus, the prosecutor in such a situation would plead that the offense occurred over a designated period of time and not on a specific date and time.

In the instant case, the People pled a single date, not a period of days, weeks or even months [4]. The information as worded was sufficient to provide the appellant with reasonable and adequate notice to enable her to prepare her defense to the allegation

that the crime charged occurred on one specific day. Thus, appellant had prepared her defense with regard to the allegations concerning her conduct on July 23, 1996 at about 10:00 a.m. The continuing crime theory does not apply to this case.

The trial court exacerbated the surprise and prejudice to the defense in application of the continuing crime theory by refusing to rule in advance as to whether it would apply [98-99]. Further, the trial court's inconsistent and confusing *ad hoc* rulings precluded a comprehensible defense. It was impossible for defense counsel to know what the parameters of the unstated period of time was at any given moment and, therefore, he could not adequately defend appellant.

In affirming appellant's conviction, the Chautauqua County Court agreed that the trial court properly admitted evidence of a continuing crime, specifically holding that:

> This Court agrees that the People would be hampered in attempting to prove their case if only allowed to present proof of acts occurring on July 23rd. The conditions testified to by the witnesses did not occur overnight. In order for the jury to obtain an accurate account of the conditions, it was not error for the Court to permit the challenged evidence.

The Chautauqua County Court erred as a matter of law in rejecting appellant's challenge to the propriety of the continuing crimes theory under the circumstances of this case. Unquestionably, the information alleged a violation of Agriculture and Market Law §353 at a specific date and time -- July 23, 1996 at 10:00 a.m. The People wish to avail themselves of the continuing crime theory; they had every opportunity to properly plead the crime charged in the

information over a designated period of time. The prosecution, however, chose to charge this as a specific date and time crime and on that basis, trial counsel prepared his defense of appellant. The application of the continuing crime theory at trial unfairly enhanced the People's case by allowing them to present what would have otherwise been considered prior bad acts evidence as part of the corpus of the crime charged and deprived appellant of the opportunity to seek preclusion of certain evidence under the principals set forth in People v. Molineaux.

C. The Trial Court Improperly Admitted Evidence of Alleged Prior Bad Acts of Appellant, Thereby Committing Reversible Error.

Over defense counsel's objections, the court permitted the introduction of certain bad acts evidence described below which were not related to July 23, 1996. Appellant contends that a hearing should have been conducted prior to the introduction of the incriminating evidence to determine its admissibility. The wrongful admission of prior uncharged conduct evidence was a critical error, denying appellant a fair trial. The Court's ruling severely prejudiced appellant by awarding the People with the advantage of essentially cruel treatment evidence, which characterized Mrs. Eimers as a person with a propensity to be cruel and abusive to animals.

On appeal, the People presented a very limited response to appellant's argument that the admission of prior bad acts of appellant was erroneous. Essentially, the People dismissed out of hand appellant's arguments in this regard, stating that the admission of prior bad acts would be proper under the continuing crime theory of prosecution or would be harmless error. Appellant maintains that this limited response did not accurately address appellant's arguments. The County Court denied appellant's challenge to the

admission of prior bad acts evidence without comment. Appellant respectfully submits that the ruling of the County Court is in error.

It is well established that evidence of a defendant's prior criminal or immoral conduct is inadmissible if it cannot logically be linked to some specific material issue in the case. People v. Hudy, 73 N.Y.2d 40, 54, 538 N.Y.S.2d 187, 205 (1988) (citations omitted). Prior uncharged criminal or immoral conduct:

> . . . is usually excluded because it may (1) require defendant to meet a charge of which he had no notice; (2) raise collateral issues and direct the attention of the jury away from the crime charged; or (3) result in the proof of prior offenses being taken by the jury as justifying the condemnation of the defendant irrespective of his guilt of the offenses charged (citations omitted).

People v. Lewis, 69 N.Y.2d 321, 325, 514 N.Y.S.2d 205, 207 (1987); see also, People v. Molineaux, 168 N.Y. 264, 313, 61 N.E. 286 (1901). If the only purpose of the proposed evidence is to demonstrate defendant's bad character or propensity to engage in criminal conduct, it may not be admitted. People v. Alvino, 71 N.Y.2d 233, 241, 525 N.Y.S.2d 7, 11 (1987). However, evidence of prior uncharged crimes may be admissible if it helps to establish an element of a crime under consideration at trial. Id.; see also, People v. Roides, 124 A.D.2d 967, 508 N.Y.S.2d 826, 827 (4th Dept. 1986).

This Court has held that whether to admit uncharged crime evidence is to be determined by a two-step process. First, the trial court must determine whether the proponent of such evidence has demonstrated that it is relevant to a material issue in the case. Second, ". . . even when admissible for such purposes, the evidence

may not be received unless its probative value exceeds the potential for prejudice resulting to the defendant." See, People v. Hudy, 73 N.Y.2d 40, 538 N.Y.S.2d 187, 197 (1988), and People v. Kocyla, 167 A.D.2d 938, 562 N.Y.S.2d 294 (4th Dept. 1990). In the instant case, the prior bad act evidence submitted by the People was obviously not demonstrative of a relevant material issue in the case.

In People v. Ventimiglia, 52 N.Y.2d 350, 488 N.Y.S.2d 261 (1981), this Court advised that a prosecutor intending to offer prior bad act evidence should seek a preliminary ruling on the admissibility of such evidence out of the presence of the jury, either "prior to trial, just before the trial begins or just before the witness testifies." Id., 52 N.Y.S.2d at 362, 488 N.Y.S.2d 261, ___. This Court further held that, "the evidence to be produced can be detailed to the Court, either as an offer or proof by counsel or, preferably, by presenting the live testimony of the witness," thus giving the trial judge a better opportunity to "assess how the evidence came into the case and the relevance and probativeness of, and necessity for it against its prejudicial effect, and either admit or exclude it in total, or admit it without prejudicial parts when that can be done without distortion of its meaning." People v. Ventimiglia, supra; see also, People v. Matthews, 68 N.Y.2d 118, 122, 506 N.Y.S.2d 149 (1986).

Additionally, this Court explained that:

> When a prosecutor, knowing that such evidence is to be presented, waits until objection is made, when it is offered during trial before informing the Court of the basis upon which he considers it to be admissible, there is unfairness to the defendant, even if his objection is sustained, in view of the questionable effectiveness of cautionary instructions in removing prior crime evidence from

> consideration by the jurors. There is, moreover, a greater probability of error and consequent waste of scarce judicial resources, when evidentiary rulings are made during trial than in the more relaxed atmosphere of an inquiry out of the presence of the jury.

People v. Ventimiglia, 52 N.Y.2d at 361, 438 N.Y.S.2d at 265.

In the instant case, the prosecution failed to even request a preliminary ruling pursuant to Ventimiglia to determine the admissibility of prior bad acts that were put before the jury on numerous occasions. For example, Paul Switzer testified to both specific and general conditions of Mrs. Eimers' kennels over the last couple of years, over defense counsel's objections [182-91]. Additionally, Ruthanne Moscato was permitted to testify to generally muddy and odorous conditions of Mrs. Eimers' kennel, without drawing even the slightest reference to July 23, 1996. Michiah Wojcinski was also permitted to testify as to the unfortunate conditions of a chihuahua and a poodle a week before the charged incident, giving rise to the obvious impression that Mrs. Eimers had a propensity to be negligent or careless in the treatment of the animals in her care.

Under Molineaux, the People were required to prove that these instances of alleged prior misconduct were admissible and that their probative value exceeded their prejudicial effect. In the instant case, whatever probative value the disputed testimony might have had, its prejudicial effect was overwhelming. The jurors were exposed to testimony of conditions extant only occasionally over a number of years, but was left with the impression of a generally unhealthy facility -- even though the only issue before them involved the specific conditions on the date charged.

Moreover, when evidence of prior bad acts is received, the jury must be instructed as to the limited purpose for which the proof was admitted. People v. Ricchiuti, 93 A.D.2d 842, 845, 461 N.Y.S.2d 67, 71 (2d Dept. 1983). Limiting instructions should be given both when the evidence comes in and during the charge to the jury. See, People v. Celestino, 201 A.D.2d 91, 96, 615 N.Y.S.2d 346, 349 (1st Dept. 1994). The trial court failed to advise the jury that the prior bad acts introduced did not constitute proof that appellant possessed a propensity to commit the crimes charged. The Court did, however, make a feeble effort in an attempt to strike certain evidence from the record [182]. Regarding Mr. Switzer's recollection of what had happened within the last couple of years at the Eimers' kennel, the Court stated, "Let's see what he says about the last couple of years, then we can strike it" [182]. The Court subsequently allowed the testimony and then stated, "strike that from your minds" [183]. Appellant submits that this after-the-fact instruction was ineffectual as a curative in that the damage had already been done and would note that this inherently unreliable method of dealing with the admissibility of purported prior bad acts evidence is in direct contrast to this Court's warning in Ventimiglia that such rulings should be made prior to presentation of bad acts evidence so as to protect the defendant from the prejudice which occurs when the jury is exposed to inadmissible proof.

The trial court's improper admission of prior bad acts evidence severely prejudiced the defense by placing propensity evidence before the jury for its consideration. This error was magnified by the absence of a specific final instruction detailing the purposes for which this proof could be considered with respect to a violation of §353, creating a very real danger that the jury may have evaluated the prior uncharged crimes evidence improperly. Accordingly, appellant submits that the Chautauqua County Court erred in rejecting appellant's arguments that the prior bad acts evidence discussed above should not have been admitted at trial.

D. Charges Against Appellant Should Have Been Dismissed for the People's Failure to Meet its Obligation Under CPL §30.30.

Appellant was arrested on July 31, 1996 and was charged with cruelty to animals in violation of §353 of the New York State Agriculture and Markets Law. Defense counsel was retained on July 31, 1996 and he subsequently made his first appearance on August 6, 1996. On August 13, 1996 defense counsel made a motion to suppress all evidence seized pursuant to the search warrant. The Court granted the motion to suppress on August 16, 1996 in open court and with no opposition from the People, who thereafter asked the Court to dismiss the initial charge without prejudice. The prosecution then filed new charges against the appellant, and she was arraigned on September 17, 1996 wherein she entered a plea of not guilty.

Pursuant to CPL §30.30, the time limitation relates back to the filing of the first accusatory instrument and is ascertained from that date. See, People v. Sinistaj, 67 N.Y.2d 236, 501 N.Y.S.2d 793 (1986); People v. Lomax, 50 N.Y.2d 351, 428 N.Y.S.2d 937 (1980). The initial information against appellant was filed on July 31, 1996. The following delays were chargeable to the People: (1) July 31, 1996 to September 16, 1996 (48 days); (2) September 16, 1996 to October 21, 1996 (34 days); and (3) December 2, 1996 to April 24, 1997 (143 days) [65].

Thus, a total of 226 days elapsed during which the District Attorney had failed to do anything to advance the case to trial [66]. Obviously, these delays greatly exceed the 90-day limit provided by CPL §30.30(1)(b) for a misdemeanor punishable by a sentence of imprisonment of more than three months. The People, however, contend that they did not violate CPL §30.30 because they had filed

a timely statement of readiness prior to Mrs. Eimers' arraignment on the second charging instrument.

In the case of People v. Kendzia, 64 N.Y.2d 331, 486 N.Y.S.2d 888 (1985), this Court stated that "ready for trial" in CPL §30.30(1) encompasses two necessary elements:

> First, there must be a communication of readiness by the People which appears on the trial court's record. This requires either a statement of readiness by the prosecutor in open court, transcribed by a stenographer, or recorded by the Clerk, or written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk, to be placed in the original record (citation omitted). As the prosecutor must make an affirmative representation of readiness (see, People v. Santiago, 96 A.D.2d 720, 465 N.Y.S.2d 364), he may not simply rely on the case being placed on a trial calendar.

N.Y.2d at 337, 486 N.Y.S.2d at 890.

That the District Attorney's Office may have forwarded to the appellant a "statement of readiness" dated September 16, 1996 -- one day before the appellant was even arraigned -- is irrelevant. At that time, the defendant had not been arraigned and the Court did not have jurisdiction over appellant. CPL §1.20; People v. Grant, 16 N.Y.2d 722, 723, 262 N.Y.S.2d 106, 107 (1965) ["[T]he trial court had jurisdiction of the offense charged and acquired jurisdiction of defendant's person by the filing of an information and an appearance by defendant" (emphasis added)]. Consequently, there was no case to declare ready. Moreover, it has been held that when the People announce their readiness for trial prior to the

arraignment on the relevant charges, such declaration of readiness is ineffectual. People v. Leavy, 204 A.D.2d 898, 612 N.Y.S.2d 488 (3d Dept. 1994), citing, People v. England, 195 A.D.2d 751, 752, 600 N.Y.S.2d 320, lv. denied, 82 N.Y.2d 753, 603 N.Y.S.2d 995; People v. Battaglia, 187 A.D.2d 808, 810, 589 N.Y.S.2d 694 (3d Dept. 1992).

Moreover, the District Attorney never gave notice of readiness to defense counsel despite his numerous appearances. In that respect, prosecutors are held to strict compliance with respect to legally mandated notices. See, People v. Zhu, 654 N.Y.S.2d 272 (Kings Cty. 1997), rev'd on other grounds, 245 A.D.2d 296, 670 N.Y.S.2d 122.

Obviously, the People failed to meet the requirements of CPL §30.30(1) by not notifying defense counsel that they were "ready for trial." Specifically, during the People's argument concerning the CPL §30.30 motion brought by appellant on April 15, 1997, it was the People's contention that they did not have to issue a statement of readiness to defense counsel because as a point of law, when the case was dismissed, Mr. Brautigam did not have at that time have any standing as Mrs. Eimers' attorney [84]. Further, the People argued that when the charges were refiled, they filed with the appellant directly and the Court on September 16th a statement of readiness which was well within the mandated ninety days [84]. This argument is specious.

The People were obviously well aware that Mr. Brautigam was defense counsel in this case. The People's argument is nonsensical given that they specifically engaged in correspondence with Mr. Brautigam, received a motion from him and had appeared in Court with Mr. Brautigam personally. On appeal to the County Court, the People argued that they had no obligation to forward a notice of readiness to Mr. Brautigam based on an alleged

conversation which took place between the Assistant District Attorney and Mr. Brautigam. The People claim that Mr. Brautigam allegedly informed the Assistant District Attorney that he would either be fired or not represent Mrs. Eimers in the future because their relationship had deteriorated badly. Besides the fact that this argument has no basis in the record, this alleged conversation did not establish that Mr. Brautigam had been dismissed as defense counsel.

Further, contrary to the People's representations below, there is nothing the prosecution can do, short of requesting disqualification of counsel, to terminate an existing attorney/client relationship. For the purposes of this case, the People had no reason to believe that the attorney/client relationship between counsel and Mrs. Eimers had been discontinued. Until they were made aware otherwise, the People should have notified defense counsel of their readiness as required in Kendzia.

Consequently, appellant requests that this Court grant leave to appeal in order that this meritorious issue may be considered by the Court.

E. Appellant Was Severely Prejudiced by the Admission of American Kennel Club Standards Where She Was Not Charged With Violating Those Standards.

In the course of appellant's trial, the trial court allowed the introduction of AKC standards from Holly Loffland, an inspector for the American Kennel Club. As the Court is now aware, appellant was charged with violating §353 of the Agriculture and Markets Law; she was not on trial for violating American Kennel Club standards. Thus, the introduction of these standards before the jury was prejudicial given their propensity to create confusion for

the jury. There is a strong likelihood that the jury may have either (1) applied the wrong standard; or (2) presumed that because the defendant was found to have violated AKC standards she must have violated §353.

Agriculture and Markets Law §353 [overdriving, torturing and injuring animals; failure to provide proper sustenance], provides in relevant part, that:

> A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdrive, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year or by a fine of not more than $1,000 or by both.

Agric. & Mkts. §353 (1991).

Specifically, Ms. Loffland was asked what an inspection for the AKC consisted of [209]. She testified that the inspection consisted of assessing the completeness of record keeping as required by AKC rules and regulations with respect to all dogs registered by them [209]. Ms. Loffland further testified that

Mrs. Eimers was cooperative and allowed her to perform a physical inspection of the kennels.

Most notably, over defense counsel's objection, the Court allowed Ms. Loffland to testify that had she had the power to sanction the appellant for violating AKC rules on July 23, 1996 and that she would have suspended Mrs. Eimers' AKC privileges [227]. Therefore, before the jury heard all of the evidence relevant to the charges they were informed that Mrs. Eimers had violated AKC rules and regulations pertaining to the well-being of her animals.

On appeal to the County Court, the People contended that the testimony of Ms. Loffland was permitted to show only that she was an invitee of the Eimers and that the Eimers had a one-day notice of her arrival. Further, the People claim that defense counsel failed to object to Ms. Loffland's testimony. These claims are not supported by the record.

In the first instance, appellant does not contend that Ms. Loffland should not have been allowed to be a witness. Rather, she specifically argues that Ms. Loffland should not have been permitted to testify that Mrs. Eimers was in violation of and could have had her American Kennel Club certification suspended [223]. Further, defense counsel specifically objected to the admission of Ms. Loffland's statements regarding the AKC standards [223].

It has long been held that instructions of the court in a criminal case constitute the theory upon which the case goes to the jury and are the law of the case. It is presumed that the conviction is based on the legal instructions given to the jury. See, People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928); see also, People v. Lewis, 238 N.Y. 1, 143 N.E. 771 (1924).

The standards applicable to the AKC organization were clearly irrelevant and may have caused the jury to apply the wrong standard during its deliberations. Further, there is a significant likelihood that appellant was convicted based on her alleged violation of AKC standards, especially given that the trial court did not instruct the jury concerning how to evaluate Ms. Loffland's testimony concerning the AKC standards. The trial court's failure to render such an instruction created a serious risk that the jury may have considered Mrs. Eimers' purported violation of AKC standards as determinative of the issue of whether Mrs. Eimers was negligently cruel to animals in her care.

F. Appellant's Conviction is Not Supported by Legally Sufficient Evidence.

The evidence presented against appellant was also insufficient to warrant a conviction. Legal sufficiency requires an appellate court to determine whether the evidence, viewed in the light most favorable to the People, could lead a trier of fact to conclude that each of the elements of the crime have been proven beyond a reasonable doubt. People v. Wong, 81 N.Y.2d 600, 608 (1993); see also, People v. Hawkins-Rusch, 212 A.D.2d 961 (4th Dept. 1995).

The information charged Mrs. Eimers with one count of overdriving, injuring animals, and failing to provide proper sustenance arising out of an incidence which purportedly occurred on Wednesday, July 23, 1996 at her residence. During trial, a dispute arose regarding introduction of evidence not pertaining to the date charged on the information. As a result, witnesses were allowed to testify to events which were not illegal but taken cumulatively had an extremely prejudicial impact on appellant. Moreover, because the information alleged misconduct with respect to 132 dogs, pursuant to the legal instructions received by the jury,

the jurors were allowed to find guilt without being required to unanimously agree that Mrs. Eimers had violated Agriculture and Market Law §353 with respect to any specific animal(s). Put another way, while the jury's verdict may have been unanimous, there is absolutely no assurance that the jurors all based their verdicts on the same evidence of cruelty. For example, the jury verdict could have been rendered unanimously but with each juror concluding that a specific animal had been abused, but with none of the jurors in agreement as to which animal(s) had been abused.

As previously stated, §353 of the Agriculture and Markets Law states, in relevant part, that:

> A person who overdrives, overloads, tortures, or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor . . . .

Not only did the People fail to prove any one of these elements with respect to one hundred thirty-two dogs, they clearly did not establish a prima facie case of this crime for even one dog. The People did not present evidence that demonstrated that any dog was overdriven, tortured, injured or not fed properly. Simply put,

the evidence presented amounted to dogs that barked, smelled, fought, and knocked their food and water dishes over.

The People contend that since they introduced testimony regarding (1) the structure of the kennels, (2) the amount of medical care which the dogs receive, (3) the condition of the coats of some of the dogs and that (4) the dogs' exercise regiment, the smell of the kennel and the barking which came from the kennels, they presented sufficient evidence to warrant a conviction. This argument is meritless.

Specifically, Ms. Loffland, the AKC inspector, testified to insignificant facts with regard to the crime charged: the dogs "appeared to be fighting" [214]; "the dogs were right on the ground" [216]; "cockerspaniels and border collies had severe matting" [218]; "some of the pens had spilled food and fecal matter" [218]; "one golden retriever had a very large sore on the tip of the nose" [219]; and "some of the [water] buckets were either spilled or empty" [222].

Other witnesses for the People were neighbors of appellant. They merely testified that they could hear barking or smell the dogs from their homes; neither of which are elements of the crime charged.

Clearly, the trial proof was not sufficient to allow a trier of fact to conclude that any element of the crime of overdriving, torturing and injuring animals or of failure to provide proper sustenance had been proved beyond a reasonable doubt. People v. Wong, supra. The People's evidence proved only one thing with certainty, the obvious: dogs do fight and play, knock over their food dishes, bark and go to the bathroom when and wherever they desire. There was no proof that any of the dogs were malnourished or that the conditions had lasted more than a day or two. Further,

other than one dog with a sore on its nose, there was no proof of pain, suffering or death of any of the animals in Mrs. Eimers' care.

G. The Informations Charging Appellant Were Defective Within The Meaning of CPL §170.35(1)(a).

Appellant moved for an order pursuant to Criminal Procedure Law §170.35(1)(a) dismissing the information on the ground that the accusatory instrument was defective within the meaning of CPL §170.35(1)(a), in that they failed to allege an offense pursuant to the legal requirements set forth in CPL §100.40(1)(c), and expressly upheld by this Court in People v. Alejandro, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987).[2]

A valid and sufficient information is a non-waivable jurisdictional pre-requisite to a criminal prosecution. See, People v. Alejandro, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987); People v. Hall, 48 N.Y.2d 972, 425 N.Y.S.2d 56 (1979); People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977).

CPL §140.40(1) sets forth the express conditions which must be met by an information. The absence of one or more condition renders the information fatally defective. First, the entire information must conform to the requirements of CPL §100.15 which prescribes the form and content for informations and complaints. Next, the factual part of the information must meet two

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[2] Obviously this motion was denied. Counsel for appellant made a concerted effort to locate the Judges ruling pertaining to the denial of appellants motion. Neither this Court nor the Town of Pomfret Court were aware of any such written ruling or transcription.

conditions: (1) the allegations set forth in the information must provide reasonable cause to believe that defendant committed the offense; and (2) non-hearsay allegations must establish, if true, every element of the offense charged. People v. Alejandro, supra.

The Alejandro Court specifically noted that:

> "The factual part of such instrument must contain a statement of the complaint alleging facts of an evidentiary character supporting or tending to support the charges." CPL §100.15(3).

Id. at 930 (emphasis added).

The Alejandro Court further noted that important purpose behind the strict requirements for the contents of an information:

> The reason for requiring the additional showing of a prima facie case for an Information lies in a unique function that an Information serves under the statutory scheme established by the Criminal Procedure Law. An Information is often the instrument upon which the defendant is prosecuted for a misdemeanor or a petty offense. Unlike a felony complain (C.P.L. §180.10), it is not followed by a preliminary hearing in a grand jury proceeding. Thus, the People need not, at any time prior to trial, present actual evidence demonstrating a prima facie case, as with an indictment following a felony complaint.

* * *

> That it was the distinguishing characteristic of an Information -- its use as the sole instrument upon which the defendant could be prosecuted -- which prompted the legislature to write in the special restrictions applicable to Informations found in CPL §100.40(1)(c) and §100.15(3) is confirmed by the legislative history leading to the enactment of these sections as part of the Criminal Procedure Law... [A]n "Information" (charging a misdemeanor or a petty offense) must demonstrate both "reasonable cause" and a "legally sufficient" or prima facie case -- a much more demanding standard [than that necessary for a felony complaint].

Id. at 930. This Court thus concluded that the showing of a *prima facie* case through non-hearsay allegations of an evidentiary nature alleging every element of the offense is a non-waivable jurisdictional pre-requisite. Id. at 931.

Here, defense counsel specifically argued that the information did not substantially conform to the form and content requirements prescribed in CPL §100.15(3) as required by CPL §100.40(1)(a) and the requirements as the sufficiency of the instruments on their face prescribed in CPL §100.40(1)(b) and (c). The factual parts of the information together with the single supporting deposition did not provide reasonable cause to believe that appellant committed the offense charged, nor establish every element of the offense charged.

The rules of construction provide that "it is reasonable to assume that it is the design of the legislature to punish as criminal offenses only those acts which are intentionally committed" (emphasis added) [N.Y. Statues §274 (McKinney 1971) (citing People v. Fanchawe, 19 N.Y.S. 865 (1982) aff'd, 137 N.Y. 68, 32

N.E. 1102, and Martin v. Goldstein, 20 App.Div. 203, 46 N.Y.S. 961 (892)].

The information charging Mrs. Eimers with violating §353 does not meet the requirements of CPL §100.40(1)(b) or (c). The language of §353 cannot be construed to include conditions such as overcrowding or unsanitary conditions. Appellant was accused of being "negligently cruel," but the information and deposition do not indicate that at any time Mrs. Eimers acted in a manner that could be considered unlawful as defined in §353.

The information must charge the offense in plain, concise, intelligible language stating facts without conclusions or evidence. It must describe or identify the acts or facts constituting the offense, with accuracy, exactness and precision. See, People v. Schildhaus, 10 Misc.2d 641, 642, 173 N.Y.S.2d 115 (1958) citing People v. Zambounis, 251 N.Y. 94 (1929). Once again, when the information fails to state facts sufficient to constitute the crime charged, it is jurisdictionally defective and must be dismissed. See, People v. Alejandro, supra. Deposition provided by Ms. Loffland from the AKC organization provides a conclusive opinion: the dogs were being deprived of "wholesome air, shelter and water," [deposition p.3]; as well as a conclusive feeling: "I feel Mrs. Wendy Eimers did not provide the essential care needed for basic medical treatment of the animals" [deposition p.3]. As defense counsel argued below the deposition is not an addendum to an information.

The courts have said "a supporting deposition is an indispensable part of an accusatory instrument, changing it from a misdemeanor complain upon which defendant may not ordinarily be prosecuted into information upon which defendant may be prosecuted." See, People v. Redding, 109 Misc.2d 487, 491, 249 N.Y.S.2d 204 (1981). Not only are the factual allegations in the information and the deposition insufficient to validate the

misdemeanor complaint in this instance, but the conclusive opinion and feeling of deponent had no role in validating the complaint.

Essentially, appellant was charged with violating a penal statute, and tried for violations that were construed from circumstances that were not illegal; and she was tried for an act that is not clearly described or forbidden.

Therefore, pursuant to Alejandro, supra, it follows that the instant information clearly failed to allege, through non-hearsay factual allegations, the necessary elements of the crime charged, and should therefore be dismissed. People v. Alejandro, supra. Moreover, once again, the information charged, "approximately one hundred thirty-two dogs were kept in over-crowded and unsanitary conditions with little or no shelter for each animal." It is appellant's contention that respect to this one count information, the People were required to present proof with respect to 132 dogs. The People argue that since they are not required to prove guilty beyond a reasonable doubt in their initial information, the information in the instant case, together with the supporting deposition of Ms. Holly Loffland, provided reasonable cause to believe that the defendant committed the offense charged. However, the People have overlooked the fact that Mrs. Eimers had 132 dogs, and the People never specified which dogs she had allegedly neglected or mistreated.

Essentially, because appellant was alleged to have mistreated 132 dogs, there is no reliability in the fact that there existed a unanimous verdict. Arguably, because there was more than one offense alleged in one count (possibly, one hundred thirty-two offenses), individual jurors might have voted to convict the appellant of that count on the basis of different offenses; the appellant would thus stand convicted under the count even though the jury may have never reached a unanimous verdict as to any one of the dogs. See,

People v. MacAfee, 76 A.D.2d 157, 159-160, 431 N.Y.S.2d 149, supra.

Because the People did not have to put forth evidence of abuse to one particular dog, appellant is unaware of what she was convicted for. Was she convicted of (1) dachshunds fighting aggressively; (2) several dogs in pens with several days of fecal matter; (3) the ground pens housing St. Bernards with fecal matter of one inch in diameter and three inches high; (4) dogs running through fecal matter; (5) cockerspaniels and border collies with matted coats; (6) dogs with flies landing on their bodies; (7) some dogs with open sores on their ears and noses; (8) a golden retriever with a sore on its nose; (9) the smell of urine/ammonia coming from the whelping room; (10) some cages with dirty bedding; or (11) in the opinion of the inspector the dogs were deprived of wholesome air, shelter and water.

Moreover, the court's charge to the jury exacerbated this problem by providing two legal theories upon which the jury could convict appellant: (1) failing to provide proper food and sustenance; and (2) wilfully furthering an act of cruelty by causing pain, suffering or death to animals at her residence [340-41]. The trial court's failure to charge that the jurors' vote must be unanimous as to the theory underlying the conviction not only deprived appellant of a fair trial, but also made it even more difficult to determine the conduct upon which the jury rendered its verdict against Mrs. Eimers.

H. Conclusion.

The Chautauqua County Court erred in affirming appellant's conviction. The overwhelming prejudice suffered by appellant at trial -- most glaringly the discriminatory preclusion of a defense witness because of her physical disability -- call for review of these

serious errors by this Court. Accordingly, appellant respectfully requests that this Court grant appellant leave to appeal the decision and order of the Chautauqua County Court.

Respectfully submitted,

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PJC/slw
Enclosures

cc: William F. Coughlin, ADA